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No. 86-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DAVID L. WILKINSON,
Attorney General of the State of Utah,
Appellant,

v.

CONNIE R. JONES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED *

1. "[W]hether the First Amendment denies government any power to restrict the public [dissemination] of indecent [material on cable television] in any circumstances." *FCC v. Pacifica Foundation*, 438 U.S. 726, 744 (1978) (opinion of Stevens, J.)

2. Whether the lower courts erred in striking down on its face a state cable television indecency statute notwithstanding the fact that the legislation, which "rest[s] entirely on a nuisance rationale under which context is all-important" (*Pacifica*, 438 U.S. at 750), has never been enforced in a concrete factual situation.

3. Whether the attorneys' fees provision of 42 U.S.C. § 1988, which was drafted to eliminate some of the financial hurdles preventing persons with "little or no money" from enforcing their civil rights (S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976)), authorizes large fee awards to wealthy corporate litigants who would have pressed their claims absent the statute.

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* In addition to the parties set forth in the caption, the following are parties to this action:

1. *Plaintiffs:* Lynn F. Jones; Caroline A. Snow; Ralph McCleary; Kay Ulrich; Ed Ulrich; Wayne Williams; Community Television of Utah, Inc.; Community Cable of Utah, Inc.; Utah Satellite, Inc.; Wasatch Community T.V., Inc.; the non-corporate plaintiffs were named representatives of a class of similarly situated cable television subscribers.

2. *Plaintiff in Intervention:* Home Box Office, Inc.

3. *Defendant:* In addition to being named in his official capacity, David L. Wilkinson was named, by order of the district court, as a representative of a class of all persons empowered to enforce the Utah Cable Television Programming Decency Act.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit (App. A), dated September 8, 1986, is reported at 800 F.2d 989. The district court's memorandum decision (App. B) is reported at 611 F. Supp. 1099. The district court's order (App. C) granting plaintiffs' motion for an award of attorneys' fees, dated June 28, 1985, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1986 (App. D). The notice of appeal (App. E) was filed with the clerk of the United States Court of Appeals for the Tenth Circuit on November 21, 1986. An extension of time to and including January 6, 1987, in which to docket this appeal was granted by Associate

Justice Byron R. White on November 25, 1986. The Court has jurisdiction of this appeal under 28 U.S.C. § 1254(2).[1]

CONSTITUTION AND STATUTES

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

The entire text of the Cable Television Programming Decency Act, Utah Code Ann. § 76-10-1701 through 1708 (Supp. 1986), is set out in App. F.

STATEMENT OF THE CASE

Cable television has become a pervasive presence in modern American homes.[2] The development and expan-

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[1] The first two questions presented by appellant, which deal with the propriety of a federal court's invalidation of an important state statute on First Amendment grounds, are plainly within the appellate jurisdiction conferred by 28 U.S.C. § 1254(2). The jurisdictional basis for the third question is somewhat more ambiguous. Although the Court's appellate jurisdiction under 28 U.S.C. § 1254 extends to "[*c*]*ases* in the courts of appeals" (*ibid.*, emphasis added), not just discrete "issues" in those "cases," it is not altogether clear that the question involving the propriety of attorneys' fee awards under 42 U.S.C. § 1988 falls within the purview of § 1254. Should the Court conclude that this question is not within its appellate jurisdiction, appellant requests that the Court treat this jurisdictional statement as a petition for a writ of certiorari on that question and grant certiorari on the issue. *See* 28 U.S.C. § 2103 (appeal papers may be "regarded and acted on as a petition for a writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken"). *See also Addington v. Texas*, 441 U.S. 418, 422-423 (1979) ("construing the [appeal] papers filed as a petition for a writ of certiorari, we now grant the petition").

[2] *See, e.g.*, App. A at 34a (Baldock, J., concurring); Riggs, *Indecency on the Cable: Can It Be Regulated?*, 26 Ariz. L. Rev. 269, 269 & n.1, 311-319 (1984) (hereafter cited as "Riggs").

sion of the medium has resulted in significant public benefits, such as diversity and increased program choice. Along with its benefits, however, cablecasting [3] also has "the capacity * * * to invade the privacy of the home with uninvited, unexpected, and unwanted program material of a patently offensive nature." [4] This case raises important questions regarding the ability of a state constitutionally to regulate indecent program material by channeling its presentation so as to minimize its impact on unwilling adult and susceptible child viewers.

1. The Utah Cable Television Programming Decency Act

The 1983 Cable Television Programming Decency Act (the "Act") represents the second effort by the State of Utah to accommodate the First Amendment rights of cable television operators and their subscribers with both the privacy interests of adult viewers who do not wish to be assaulted by patently offensive material and the interests of the State in the " 'well-being of its youth.' " *FCC v. Pacifica Foundation*, 438 U.S. 726 at 749 (1978) (quoting *Ginsberg v. New York*, 390 U.S. 629, 640 (1968)). The earlier statute, enacted in 1981, made it a misdemeanor to "knowingly distribute by wire or cable any pornographic or indecent material." [5] That statute completely prohibited the depiction of "illicit sex or sexual immorality," [6] which was broadly defined "to include most depictions of nudity, sexual activity, and

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[3] "Cablecasting" is here used to distinguish the transmission of the final stage of television signals through a coaxial or other cable from transmission entirely through the atmosphere, as occurs with traditional "broadcasting."

[4] Riggs, *supra*, at 312.

[5] Utah Code Ann. § 76-10-1229 (Supp. 1986). *See also* Riggs *supra*, 26 Ariz. L. Rev. at 294 (describing the 1981 act as "poorly drafted").

[6] Utah Code Ann. § 76-10-1227 (Supp. 1986).

other * * * erotic acts."[7] The United States District Court for the District of Utah declared that this outright ban on the presentation of sweepingly defined non-obscene material was constitutionally overbroad.[8] The Utah Attorney General did not appeal from that judgment.

In 1983, the Utah legislature enacted a second cable decency statute, this time paying close heed to the decisions of this Court. In its official statement of intent accompanying the Cable Television Programming Decency Act, the legislature declared that the Act was intended "to protect, in a broad sense, the rights of free speech guaranteed by the First Amendment * * * as interpreted by the United States Supreme Court." App. G at 99a. The legislature noted that, in assessing the constitutionality of attempts to regulate the media, this Court has "considered such factors as the pervasive presence [of the regulated medium] in the community, the extent to which it invades the privacy of the home, and the accessibility of the medium to children." *Ibid. Cf. Pacifica*, 438 U.S. at 748-750. The legislature, "after a careful evaluation of the cable television medium," concluded that indecent cable television programming may be regulated legitimately to some extent because (App. G at 99a):

> (1) children have access to cable television and, in many cases, are unsupervised by parents; (2) cable television receivers are in the home, a place where the individual's privacy interest is afforded and entitled to extra deference; (3) unconsenting adults may, without warning, tune into a cable television program where offensive language or depictions are being transmitted; and (4) because, as a practical matter, there is a limit to the number of cable television stations that a community will be able to franchise.

These considerations, which closely track the policies supporting FCC regulation of indecent broadcast materials

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[7] Riggs, *supra*, 26 Ariz. L. Rev. at 294.

[8] *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

(*Pacifica*, 438 U.S. at 731 and n. 2), persuaded the legislature to undertake the "delicate task of balancing these concerns with the First Amendment rights of cablecasters." App. G at 100a.

The delicate balance struck in the 1983 Act differs significantly from the approach of Utah's first cable television statute. First, there are no criminal penalties attached to the Act. Instead, the Act provides for a maximum fine of $1,000 plus costs and attorneys' fees for a first offense.[9] Second, the Act does not prohibit the cablecasting of objectionable materials. Rather, it merely entitles the Utah Attorney General or any county or city attorney to bring a civil nuisance action against any person who, "as a continuing course of conduct, * * * knowingly distributes indecent material within this state over any cable television system or pay-for-viewing television programming." Utah Code Ann. § 76-10-1703 (Supp. 1986).

Finally, unlike the earlier cable statute, the Act carefully limits "indecent material" to a display of a specifically described sexual activity (including a sexual or excretory organ or function, sexual intercourse or masturbation)[10] which "the average person applying con-

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[9] Utah Code Ann. § 76-10-1704 (Supp. 1986). The maximum civil penalty for a repeat offender is "$10,000, plus costs and reasonable attorney's fees." § 76-10-1704(4).

[10] The sexual activities or states covered by the Act include (Utah Code Ann. § 76-10-1702(4) (Supp. 1986):

> (a) A human sexual or excretory organ or function; or
>
> (b) A state of undress so as to expose the human male or female genitals, pubic area, or buttocks, with less than a fully opaque covering, or showing of the female breast with less than a fully opaque covering of any portion below the top of the nipple; or
>
> (c) An ultimate sexual act, normal or perverted, actual or simulated; or
>
> (d) Masturbation

temporary community standards for cable television or pay-for-viewing television programming would find is presented in a patently offensive way for the time, place, manner and context in which the material is presented."[11] Thus, under the Act, a cablecast is not actionable unless the material is presented "in a patently offensive way," as judged by contemporary community standards for cable television, with full consideration of its "time, place, manner and context." Utah Code Ann. § 1702(4) (Supp. 1986). This essential flexibility follows this Court's recognition that, for media regulation resting on a nuisance rationale, "context is all-important. The concept requires consideration of a host of variables." *Pacifica*, 438 U.S. at 750.

Following passage of the Act, the appellant, the Attorney General for the State of Utah, received a request from the county attorney for Davis County, Utah, to issue a formal opinion interpreting the statute.[12] In response, the appellant issued Formal Opinion No. 83-001 (App. H) on October 17, 1983. Relying on the plain wording of the Act, the legislative intent statement, and transcripts from the legislative debates surrounding its enactment, the Opinion interpreted the Act as complying with this Court's rulings which permit restrictions, in specified circumstances, upon the distribution of indecent, but not obscene, material.[13]

The Opinion stressed that the Act does not prohibit the distribution of indecent material at all times. "That the drafters of the Act intended it to be a * * * *regulatory* act, and not a *prohibitory* act, is abundantly clear from

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[11] Utah Code Ann. § 76-10-1702(4) (Supp. 1986).

[12] The State Attorney General is obligated to issue opinions regarding the interpretation and enforcement of State laws upon the written request of a county attorney. Utah Code Ann. § 67-5-1(6) (1986). *See also* cases cited at note 42, *infra*.

[13] *See, e.g., Pacifica, supra,* and cases cited at note 35 *infra*.

the language they employed" in the definition of "indecent material." App. H at 105a (emphasis in original). Under that definition, cablecast material is "indecent" only if found to be "patently offensive" under contemporary community standards for the "time, place, manner and context in which the material is presented." Utah Code Ann. § 76-10-1702(4) (Supp. 1986). Accordingly, the Opinion concluded that the Act does not ban the cablecast of indecent materials, but rather channels their distribution to late evening hours when the State's interests in protecting the privacy of unwilling adult viewers and minor children are reduced. App. H at 107a, 110a-112a. The Opinion quoted extensive excerpts from the legislative debates surrounding the adoption of the Act in support of the conclusion that the statute serves a channeling, rather than prohibitory, function.[14]

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[14] Those excerpts included the statement of Sen. Paul Rogers, the chief sponsor of the Act, who described the legislation as a "permissive bill" (App. H at 107a-108a):

> It is not a ban, it is not a prohibition. It does however set up minimum criteria which when implemented will tend to have a restrictive influence over indecent material which * * * [would otherwise] be widely distributed and cablecast during all different times of the day * * *. [Y]ou may have masturbation or intercourse taking place over your cable television screen, that at least it may be at a time when fewer younger members of our population for example may be present * * *.

Other legislators made similar statements explicating the channeling function of the Act. *See, e.g.*, statement of Rep. James Moss (House sponsor of the Act) (App. H at 108a) ("[The bill] is not in fact a prohibition on broadcast [sic] of all sexual activity over cable television * * *. Now prior attempts in this area have required a blanket prohibition on certain forms of speech that go beyond the standard of pornography * * *. The bill that you have before you is a much more moderate bill than that and would not preclude even the kind of things that were broadcast in the *Pacifica* case. * * * There can obviously then be times during the course of a day or night when given the time, place, manner and context

Consistent with the legislative intent to channel rather than prohibit cablecast indecency, the Opinion set out specific guidelines for enforcement of the Act by the State. Noting that a "key legislative finding, expressed in the Intent Statement, is that 'children have access to cable television and, in many cases, are unsupervised by parents,' " a concept that "lies at the heart of the United States Supreme Court's opinion in *FCC v. Pacifica Foundation*," the Opinion concluded that the Act would not be applicable to cablecasting " 'during late evening hours when fewer children are likely to be in the audience.' " App. H at 110a (quoting *Pacifica*, 438 U.S. at 760 (Powell, J., concurring)). The Opinion established the period between midnight and 7 a.m. as hours during which no enforcement actions would be taken. *Id.* at 112a-113a.[15]

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of broadcast [sic], material would not be found to be indecent. * * * Now that is not a blanket prohibition"). *See also* statement of Sen. Karl Swan (App. H at 108a) ("If it [the Act] has the effect of restricting the times that some of the other [indecent] things are shown * * * I think the public will be well served * * * and the First Amendment will still be very viable").

Excerpts from the legislative debates surrounding the Act were presented to the district court in Def. Exh. 3, Rec. Vol. X. The above excerpts were quoted in Formal Opinion 83-001 (App. H).

[15] The Opinion recognized that the definition of "late evening hours" was a " 'relatively new and difficult area of the law.' " App. H at 112a (quoting *Pacifica*, 438 U.S. at 756 (Powell, J., concurring)). In reliance on Justice Powell's observation in *Pacifica* that "both adults and unsupervised children are likely to be in the broadcast audience" during "most of the broadcast hours" (438 U.S. at 758), the Opinion reasoned that regulatory limitations were permissible during early evening hours. Accordingly, the Opinion concluded that the period between midnight and 7 a.m. was the time when there were "the fewest children unsupervised." App. H at 113a. The Opinion also found that this period met "the First Amendment need to have more than just a nominal time span duration during which indecency may be lawfully shown." *Ibid.*

2. Proceedings Below

The day following passage of the Act,[16] Community Television of Utah and three other cable television operators filed suit against the Attorney General individually, in his offiical capacity, and as the representative of all persons empowered to enforce the statute. *Community Television of Utah, et al. v. David L. Wilkinson, et al.*, Civil No. C-83-0551-A, (D. Utah). A few days later, a separate action was filed by several individual cable television subscribers. *Connie R. Jones, et al. v. David L. Wilkinson, et al.*, Civil No. C-83-0581-A, (D. Utah). The two cases were consolidated, and somewhat later Home Box Office, Inc., was allowed to intervene as an additional plaintiff.

All plaintiffs claimed, *inter alia*, that the Act was unconstitutional under the First Amendment because it regulated material that was not legally obscene. Plaintiffs further asserted that, because the State lacked any constitutional power to regulate non-obscene material, they could present their attack facially, in advance of any enforcement action or the threat of any such action. Appellant agreed not to enforce the Act until the court ruled on the plaintiffs' motion for summary judgment. The plaintiffs thereafter amended their complaints to allege that the Act was preempted by the Cable Communications Policy Act, Pub. L. 98-549, 47 U.S.C. §§ 521-559 (Supp. 1985), adopted by Congress in 1984 (App. I).

In the district court, appellant submitted videotaped excerpts from several movies which had been cablecast in Utah containing explicit sexual activity, sometimes mixed with violence, which most people would consider grossly improper for young children to view. The excerpts were submitted as representative examples of materials that

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[16] The Cable Television Programming Decency Act was passed into law on April 20, 1983. This litigation was filed at 8 a.m. the following morning. *Community Television of Utah, et al. v. David L. Wilkinson, et al.*, Civil No. C-83-0551-A (D. Utah April 21, 1983).

would prompt enforcement proceedings under the Act if cablecast as a continuing course of conduct between the hours of 7 a.m. and midnight. *See* App. H at 113a. The district court refused to consider the taped excerpts.[17]

On April 10, 1985, the district court ruled for plaintiffs on the merits. Addressing first the plaintiffs' contention that the Act was preempted by the new Cable Communications Policy Act, the district court concluded that § 638 of that Act, 47 U.S.C. § 558 (App. I at 128a), preserved the ability of the states to apply "obscenity * * * or other similar laws" (*ibid.*) to cablecasters so long as the regulated program content was not protected by the First Amendment. App. B at 53a-54a.[18] Because the Utah Act is "similar" to obscenity regulations, the district court found that the "final resolution of the preemption question necessarily requires a ruling on the first amendment issue." App. B at 54a.

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[17] Appellant also submitted the affidavits of four witnesses who averred that approximately five to ten percent of the cable movies transmitted by the plaintiffs were, in their opinions, patently offensive because of strong, explicit sexual content. Def. Exhs. 9 through 12, Rec. Vol. X. The affiants stated that they subscribed to cable television to receive "first-run neighborhood theater" type movies that "the whole family can enjoy" (descriptions used in cable advertising, see Def. Exhs. 14-17), including movies rated "R" by the Motion Picture Association, but not the patently offensive material just described. The affiants further stated that the patently offensive materials were often shown at times when their children were watching television. As with the taped excerpts, the district court disregarded the affidavits.

[18] *See* H.R. Rep. No. 934, 98th Cong., 2d Sess. 95 (1984) (47 U.S.C.. § 558 preserves state power to regulate "speech which may be held by the courts to be unentitled to constitutional protection"); *id.* at 69 (the Cable Communications Policy Act preserves the right of the states to regulate "not only obscene speech, but other speech which may also be unprotected by the Constitution" should "judicial interpretations at some point in the future deem additional standards, such as indecency, constitutionally valid as applied to cable"). *See also* 130 Cong. Rec. S14289 (daily ed. Oct. 11, 1984) (colloquy between Senators Goldwater and Trible).

Reaching the merits of the First Amendment claims, the court held the Act overbroad and invalid on its face because it "regulates 'indecent' material and does not limit itself to material that is legally obscene." App. B at 59a. The district court concluded that the State lacked authority to regulate non-obscene speech on cable television, and faulted the Act for failing to incorporate the first and third prongs of the three-part obscenity test of *Miller v. California*, 413 U.S. 15, 24 (1973).[19]

The district court rejected the argument that the State's interests in the welfare of its youth and the privacy rights of unwilling adult viewers gave the State any constitutional authority to channel cablecast indecency to late evening hours. The court concluded that *Pacifica*, which upheld the authority of the federal government to regulate broadcast indecency on such grounds, did not save the Act because the decision is subject to "narrow" factual limitations, has been limited by subsequent authority, and is inapplicable outside the realm of broadcast regulation. App. B at 61a-74a.

Finally, the district court held that the Act was "void for vagueness" because "the limiting principles contained in *Miller* are not present." App. B at 77a. The court concluded that the "time, place, manner and context" requirements of the Act are invalid because they provide "neither fair notice or warning nor reasonably clear guidelines." App. B at 78a.

By its order and final judgment dated June 28, 1985, the district court permanently enjoined the enforcement of the Act. It also granted the plaintiffs' motion for at-

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[19] Somewhat inexplicably, the district court also held that the Act failed to meet the second *Miller* prong, which requires that regulated material "depict or describe sexual conduct in a patently offensive way." Ap. B at 60a. *Cf.* App. A at 17a-18a (Baldock, J., concurring) (I cannot agree [with the district court] that [the Act] fails to satisfy the 'patently offensive sexual conduct' element of the *Miller* test").

torneys' fees under 42 U.S.C. § 1988, rejecting the State's assertion that the fee statute was inapplicable to the wealthy corporate plaintiffs before the court.

The court of appeals in a brief per curiam opinion affirmed the decision of the lower court "on the basis of the reasons stated in the [district court] opinion." App. A at 5a. Judge Baldock issued a lengthy concurring opinion in which he concluded that a State does have the constitutional authority to channel indecent material to late-night viewing hours. App. A at 34a-38a. (Baldock, J., concurring). He nevertheless considered the Act unacceptably vague, and concluded that it constituted "complete prohibition rather than regulation" of indecent material and was accordingly unconstitutionally overbroad. App. A at 39a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL[20]

The people of the State of Utah, through their elected representatives, have twice attempted to alleviate the assault of cablecast indecency upon unwilling adult viewers and to limit its widespread availability to impressionable children. Although the first legislative effort may well have been constitutionally infirm,[21] the Cable Television Programming Decency Act carefully follows precedent of this Court which permits limited restrictions on

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[20] As set out in this section, the federal questions presented here are plainly substantial. Accordingly, this Court need not reach the issue whether 28 U.S.C. § 1254(2) requires review regardless of "substantiality." *See* Wright, Miller & Cooper, *Federal Practice and Procedure*, § 4037 at 39 (1978) ("The historic analogy to appeals from state courts that gave birth to § 1254(2) * * * suggest[s] that appeal jurisdiction might be defeated by lack of a substantial question. This possible limitation should be rejected. * * * Appeal lies from a court of appeals * * * only if it has held a state statute invalid. There may be some state statutes that are so transparently invalid that the Supreme Court need not bother with full presentation of arguments. Such cases are apt to be rare").

[21] *See* Riggs, *supra*, 26 Ariz. L. Rev. at 270.

the distribution of indecent matter in the furtherance of substantial State interests. *See New York v. Ferber*, 458 U.S. 747 (1982); *Board of Education v. Pico*, 457 U.S. 853 (1982); *Pacifica, supra; Ginsberg v. New York, supra. See also Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159 (1986); *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. 2794 (1985). The lower courts' refusal to recognize that precedent and cede the Act any constitutional scope mandates intervention by this Court.

The questions presented are important not only to the State of Utah, but also to the Nation. In express recognition of the pressing social issues raised by the electronic dissemination of indecent matter, section 638 of the Federal Cable Communications Policy Act of 1984, 47 U.S.C. § 558 (App. I at 128a), preserves the right of the states to regulate "not only obscene speech, but other speech which may also be unprotected by the Constitution." H.R. Rep. No. 934, 98th Cong., 2d Sess. 95 (1984); *see* also 130 Cong. Rec. S14289 (Daily Ed. Oct. 11, 1984). Congress has plainly indicated its intent not to stymie state regulation of indecent material so long as state efforts are "constitutionally valid as applied to cable." H.R. Rep. No. 934 at 69. Thus, Congress recognized the importance of the questions raised here, and the reach of Congress' statute (as well as the FCC's regulatory authority thereunder) depends on the resolution of those questions. During the past several years, numerous states have considered proposals to regulate cablecasting of indecent, but not obscene, speech.[22] This case gives the

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[22] Among those states which have considered such proposals are California (S.B. No. 1700, 1981-82 Reg. Sess. (1982)), Florida (H.B. No. 26, 87th Reg. Sess. (1985)), Kentucky (H.B. No. 644 and S.B. No. 123, Reg. Sess. (1984)), Louisiana (S.B. No. 192, 80th Reg. Sess. (1982)), Massachusetts (H.B. No. 5726, 174th Bien. (1985)), Missouri (H.B. No. 558, 82d Gen. Assem., 1st Reg. Sess. (1983)), North Dakota (S.B. No. 2401, 48th Leg. Assem., Reg. Sess. (1983)), and Pennsylvania (S.B. No. 645, 169th Reg. Sess. (1985)).

Court the opportunity to clarify the extent to which such regulation is permissible.

That such clarification is needed is demonstrated dramatically by the present case. The lower courts refused to legitimize any assertion of regulatory authority over indecent—but non-obscene—cablecast material, notwithstanding its pervasive presence in the home and ready accessibility to minor children. Furthermore, despite the fact that the Act regulates only those cablecasts which constitute a "nuisance," and expressly ties enforcement to a careful consideration of "time, place, manner and context," [23] the courts below sustained a facial attack upon the statute well in advance of any concrete application of the legislation. Finally, the courts below reflexively awarded attorneys' fees to wealthy corporate litigants, even though they are clearly not within the class of persons for whose benefit the fee statute, 42 U.S.C. § 1988, was enacted. Each of these issues merits plenary consideration.

I. The State Of Utah Constitutionally May Channel Programming Which Is Presented In A "Patently Offensive Way For The Time, Place, Manner And Context In Which The Material Is Presented" To A Different Time, Place, Manner Or Context

The district court and court of appeals concluded that the Act was unconstitutionally overbroad because "it does not limit itself to material that is legally obscene." App. B at 59a; App. A at 5a. The lower courts have therefore necessarily held that the State has *no* constitutional authority to regulate *any* patently offensive material other than that which is obscene.[24] That holding is con-

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[23] Utah Code Ann. § 76-10-1702, -1703 (Supp. 1986).

[24] This, of course, contradicts this Court's answer in *Pacifica* to the question "whether the First Amendment denies government any power to restrict the public [dissemination] of indecent [material] in any circumstances." *Pacifica*, 438 U.S. at 744 (opinion of Stevens, J.).

sistent with the decision striking down the first Utah cable statute [25] and with a more recent opinion from the 11th Circuit invalidating a Florida cable decency statute.[26] But an unexamined, blanket prohibition of government regulation of indecent, but non-obscene, material "surely is an oversimplified analysis of a very complex legal issue. Past precedent does not dictate such a severe limitation upon government regulation of any other medium of communication, including the print media, and no court has attempted to provide a rationale for placing cable in a first amendment position superior to all the rest." [27]

This Court has recognized that there are substantial governmental interests in regulating communications that "come[] directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds," and in adopting " 'more stringent controls on communicative materials available to youths than on those available to adults." *Pacifica*, 438 U.S. at 759, 757 (Powell, J., concurring) (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212 (1975)).[28] These interests form the core for this Court's conclusion in *Pacifica* that the FCC had the authority to prohibit the mid-afternoon broadcast of indecent—but not obscene—material. 438 U.S. at 748-750. Quite simply, when government "finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene." *Id.* at 750-751.

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[25] *Home Box Office, Inc. v. Wilkinson, supra.*

[26] *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985).

[27] Riggs, *supra*, 26 Ariz. L. Rev. at 270.

[28] *See Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970); *Miller v. California*, 413 U.S. at 36 n.17; *Ginsberg v. New York*, 390 U.S. at 636-641; *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964) (opinion of Brennan, J.). *See also Ferber v. New York, supra* (upholding state authority to regulate child pornography not legally obscene under *Miller*).

The Cable Television Programming Decency Act rests squarely upon the above authority. In its legislative intent statement, the Utah legislature expressly found that "unconsenting adults may, without warning, tune into a cable television program where offensive language or depictions are being transmitted." App. G at 99a. It also noted that "children have access to cable television and, in many cases, are unsupervised by parents." *Ibid.* It further found that offensive materials were entering the home, "a place where the individual's privacy interest is afforded and entitled to extra deference." *Ibid.* The legislature accordingly drafted a careful regulatory measure to minimize offense to children and unconsenting adults while protecting the "rights of free speech guaranteed by the First Amendment." *Ibid.*

That regulatory measure, the Cable Television Programming Decency Act, does not reflexively ban indecent speech. Rather, the Act regulates indecency "by principles analogous to those found in the law of nuisance where the 'law generally speaks to *channeling* behavior more than * * * prohibiting it.'" *Pacifica*, 438 U.S. at 731 (quoting 56 F.C.C.2d at 98) (emphasis in original). The statute provides for a civil fine [29] to be levied against cablecasters who, as a continuing course of conduct,[30] distribute specifically defined sexual materials in such a "time, place, manner and context" as to be "patently offensive." [31] The import and operative effect of the Act is plain: graphic presentations of the specifically described sexual activities covered by the Act must be presented in a "time, place, manner and context" such that they are not "patently offensive." [32] And, such materials will be less likely to be "patently offensive" when the possibility

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[29] Utah Code Ann. § 76-10-1704.

[30] Utah Code Ann. § 76-10-1703.

[31] Utah Code Ann. § 76-10-1702.

[32] *Ibid.*

that unconsenting adults or unsupervised children are in the audience has been minimized. *Pacifica*, 438 U.S. at 748-750; *Id.* at 758-761 (Powell, J., concurring); App. H at 110a-113a.

The permissibility of such a limited, channeling regulation is plainly indicated by *Pacifica*. Indeed, the lower courts' invalidation of the Act necessarily rests upon their rejection of the legislative conclusion that *Pacifica* permits limited regulation of indecent, but not obscene, material that enters the home on cable television. The courts below first found that the rationale of *Pacifica* does not extend to cable television. They then concluded that, whatever that decision's reach, a statute based on language drawn from *Pacifica* is unconstitutionally vague.

The lower courts' refusal to apply *Pacifica* to the Act requires review by this Court. The effect of those courts' opinions is to pronounce *Pacifica* moribund—if not dead. This Court, not the district court or the court of appeals, should determine the vitality of such an important constitutional precedent, particularly in light of its effect on state legislative authority.

A. The Rationale of *Pacifica* Is Applicable To The Utah Act

The district court held that the Act was not within the "narrow" factual limits of *Pacifica* because that case did not authorize regulation "at all times of day" and the Utah statute imposes a fine for the cablecast of covered materials "at *any* time." App. B at 63a (emphasis in original). This analysis miscomprehends *Pacifica* as well as the Utah statute.

The precise question before the Court in *Pacifica* was whether a federal statute, which creates the possibility of a fine or imprisonment for anyone who "utters any * * * indecent * * * language by means of radio com-

munications," [33] permitted the FCC to sanction a broadcaster which aired comedian George Carlin's "Filthy Words" monologue at 2 p.m. in the afternoon. 438 U.S. at 729-730. The Court simply held that application of the statute to the Pacifica Foundation was not unconstitutional because the FCC, in its decision, had considered a "host of variables," including the "content of the program" and the "time of day" it was broadcast. 438 U.S. at 750.[34] The decision does not suggest that, to withstand constitutional scrutiny, a statute regulating indecency must specifically set out limited hours of operation. Indeed, the statute involved in *Pacifica*, on its face, punished the dissemination of indecency "at *any* time." App. B at 63a (emphasis in original). Thus, the district court's apparent assumption that *Pacifica* requires indecency statutes to contain an express temporal limitation is unfounded.

Furthermore, even if *Pacifica* had imposed such a standard, it is met by the Utah Act. The legislative intent statement, the legislative debates, and the Attorney General's auhoritative interpretation of the Act all make clear that the purpose of the statute is to channel indecent material to the " 'times of the day when there is [no] reasonable risk that children may be in the audience.' " *Pacifica*, 438 U.S. at 732 (quoting 56 F.C.C.2d at 98). In the face of this evidence, the lower courts' refusal to accord the Act some scope as permissible regulation under *Pacifica* was highly improper.

The district court concluded that *Pacifica*'s rationale has been substantially limited by subsequent cases, and has never been applied to "any medium other than broad-

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[33] 18 U.S.C. § 1464 (1982).

[34] *See also* 438 U.S. at 760 (Powell, J., concurring) (FCC order does not prevent Pacifica Foundation "from broadcasting the monologue during late evening hours when fewer children are likely to be in the audience").

cast." App. B at 65a. This conclusion is wrong. The only authority cited in support of it was *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). And *Bolger*, while distinguishing *Pacifica*, did not modify it. Unlike *Pacifica*, *Bolger* involved an outright ban on the dissemination of printed material discussing important public issues. Like *Pacifica*, the instant case involves an Act which does not prohibit indecency but instead channels indecent presentations to those hours when unwilling adults and minors are unlikely to be in the audience. The lower courts to the contrary, the permissibility of such a regulatory rationale has been upheld repeatedly by this Court outside *Pacifica*'s broadcasting context.[35]

The district court next held that *Pacifica* does not apply to the Act because cablecasting is an "invitee" rather than a broadcast "intruder." App. B at 71a. This dismissal of *Pacifica* is surely suspect. *Pacifica* is founded upon the broadcast media's "uniquely pervasive presence in the lives of all Americans" (438 U.S. at 748), a trait shared by cable television.[36] The "intruder-invitee" anal-

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[35] *See, e.g., Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159 (1986) (upholding authority of state to discipline student for indecent speech made during student body elections); *City of Renton v. Playtime Theatres*, 106 S.Ct. 925 (1986) (upholding zoning regulation of the locations from which non-obscene materials could be distributed); *New York v. Ferber, supra* (upholding constitutionality of state efforts to control the production and distribution of child pornography not meeting the *Miller* test for obscenity); *Board of Education v. Pico*, 457 U.S. 853 (1982) (books may constitutionally be removed from a high school library because of their vulgarity but not because of their objectionable ideas); *Young v. American Mini-Theatres*, 427 U.S. 50 (1976) (upholding zoning regulation of the locations from which non-obscene materials could be distributed); *Ginsberg v. New York, supra* (sustaining law protecting children from exposure to non-obscene material).

[36] *See, e.g.* App. A at 34a (Baldock, J., concurring) ("[j]ust as radio and television are pervasive, so too is cable television with over 34 million, or approximately 40 percent of, television households subscribing").

ysis, furthermore, ignores the reality that broadcasting too is an "invitee"—no one receives broadcast signals without first purchasing a receiver and then turning it on.[37]

The district court finally held that the governmental interest in protecting children, one of the principal grounds supporting the regulation in *Pacifica*, did not sustain the Utah Act because, "[a]lthough protecting children is a very desirable and legitimate goal, the Act itself does not mention children anywhere." App. B at 72a. The district court's disregard, on this ground, of the State's interest in safeguarding its youth is patent error.

The legislative intent statement expressly reflects the legislature's concern regarding "the accessibility of [cable television] to children." App. G at 99a. Indeed, a fundamental legislative concern animating the Act was children's unsupervised access to the medium. *Ibid.* In Utah, as elsewhere, plain statements of legislative intent are properly utilized in construing legislation. *See Christensen v. Industrial Commission*, 642 P.2d 755, 756 (Utah 1982); *Millett v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980).[38] The First Amendment does not require

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[37] When a family subscribes to family format cable (as distinguished from, for example, the Playboy Channel), what it obtains is a variety of programs from which to choose. A family should not thereby be deemed to have invited into the home, at any time, any piece of patent offensiveness with which a cablecaster may choose to surprise it. That the listeners in *Pacifica* had obtained a radio and turned it on was not cited by any Justice as an indication that they had invited the indecent monologue that followed.

[38] *See also* Office of Legislative Research and General Counsel, *Bill Drafting Manual for the State of Utah* 15 (Utah 1985) ("the drafter may have a statement of purpose read into the journal of each house as part of the official record of the legislature, rather than including it as part of the bill. The Utah Supreme Court has held that, in construing legislation, it is the court's primary responsibility to give effect to the intent of the legislature. * * * An intent

a federal court to disregard a State's interest in the "well-being of its youth" (*Ginsberg v. New York*, 390 U.S. at 640)[39] unless the very word "children" is included in the language of a statute. Indeed, the statute construed in *Pacifica* did not refer to children.

The Utah legislature has specifically found that cable television is a "pervasive and widely available influence in the community, particularly the home" (App. G at 99a), and has acted to channel patently offensive sexual material away from children and unwilling adult viewers. The Constitution does not prohibit the State from acting to protect these privacy interests in the home, "where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica*, 438 U.S. at 748 (citing *Rowan v. Post Office Dept., supra*).

B. The Act Is Not Unconstitutionally Vague

The courts below concluded that the Act is "void for vagueness" because its "time, place, manner, and context" test for "patent offensiveness" provides "neither fair notice or warning nor reasonably clear guidelines." App. B at 78a; App. A at 5a. This conclusion, in light of *Pacifica*, is highly ironic. There, the very basis for *upholding* the FCC's regulation of indecent speech was that the regulation "rested on a nuisance rationale" which required "consideration of a host of variables," including "time of day," "content of the program," "composition of the audience," and "context." 438 U.S. at 750. Apparently, the courts below have concluded that, even if *Pacifica* is applicable to the Act, the legislation nevertheless fails because the constitutional standard adopted in that case is unconstitutionally vague.

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statement, either in the bill or in the journal, may help the court or the implementing body clarify an otherwise ambiguous bill").

[39] *See also Prince v. Massachusetts*, 321 U.S. 158, 166-167 (1944).

The lower courts' reasoning is erroneous. The flexibility inherent in the Utah Act is sensible in light of First Amendment considerations and indeed is required by *Pacifica*. It creates no more vagueness than the typical obscenity statute, which must incorporate an analogous wide-ranging inquiry into contemporary community standards. *Miller v. California*, 413 U.S. at 24. Moreover, this Court has found it proper to uphold legislation where "[b]oth the text and the background of the [state] statute indicate that the state legislature sought to conform" its law to the constitutional standards outlined in the opinions of the Court. *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. at 2805 (O'Connor, J., concurring). The Utah Act and its background reflect a conscientious effort to conform to the standards set by this Court.

Any difficulties or ambiguities inherent in the Utah Act's precise wording are neither the fault of this Court nor the fault of the Utah legislature. They are intrinsic to the human condition.[40] The Utah Act, in its tracking of the language and doctrine developed by this Court, is not void for vagueness.

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[40] *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952) ("[F]ew words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line"); J. Madison, *The Federalist*, No. 37 at 229 (New American Library 1961) ("All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications").

II. The Lower Courts Erred In Striking Down The Act On Its Face Notwithstanding That It Rests Upon A Nuisance Rationale Under Which Context Is All-Important And Has Never Been Enforced In a Concrete Factual Situation

The fundamental error of the trial and appellate courts is that they have held that the State has no constitutional authority to regulate any indecent material that is not obscene. That error is compounded here by the fact that they have held an important state statute unconstitutional in its entirety based solely on speculation as to how the statute might be applied. The courts below improperly held the statute invalid as an outright ban on constitutionally protected speech despite the contrary guidance provided by the legislature's official intent statement, a narrow interpretation of the statute given by the State Attorney General, and the plainly constitutional construction of the statute suggested by *Pacifica*. In doing so, they have adopted an interpretation of the statute which favors invalidity rather than validity.

The courts below have acted directly contrary to numerous decisions of this Court requiring that constitutional decisions be based upon concrete controversies and real fact, rather than upon speculation, assumption and hypothesis.[41] The Cable Television Programming Decency Act regulates the cablecasting of patently offensive sexual material "entirely on a nuisance rationale under which context is all-important." *Pacifica*, 438 U.S. at 750. The statute "requires consideration of a host of variables"

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[41] *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969) ("we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable * * *, but will deal with those problems as they arise"); *United States v. Sullivan*, 332 U.S. 689, 694 (1948) ("The scope of the offense which Congress defined is not to be judicially narrowed * * * by envisioning extreme possible applications of its different * * * provisions * * *. There will be opportunity enough to consider such contingencies should they ever arise").

and therefore "cannot be adequately judged in the abstract." *Ibid.*; *id.* at 742 (opinion of Stevens, J.). Despite the obvious importance of a factual record in such circumstances, the lower courts proceeded with a facial invalidation of the Act prior to any enforcement action. The decisions below tear the Act from any consideration of context and deprive the judiciary of the opportunity to analyze the statute in a concrete setting. This alone was error, but there is more.

Not only did the lower court opinions proceed upon simple assumption, they also ignored the only evidence that would have reduced the level of hypothesis in the case to manageable proportions. The decisions disregard the legislative intent statement and the legislative debates, which make clear that the Act "speaks to *channeling* behavior more than actually prohibiting it." *Pacifica*, 438 U.S. at 731 (quoting 56 F.C.C.2d at 98) (emphasis in original). The district court refused to consider as well the actual examples of materials that would prompt enforcement of the Act. Finally, the lower courts disregarded the limiting construction given the Act by the State's highest legal officer. This was plain error.[42]

The course adopted below also impinges upon the proper allocation of state and federal authority and the sound administration of justice. The unwisdom of deciding cases in the abstract has both constitutional[43] and

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[42] *Ferber v. New York*, 458 U.S. at 764 (legislation to be read "as written or authoritatively construed"); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered"); *Broadrick v. Oklahoma*, 413 U.S. 600, 617-618 (1973) ("Surely a court cannot be expected to ignore these authoritative pronouncements [of the state attorney general] in determining the breadth of a statute"). *See also Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

[43] *See, International Longshoremen's and Warehousemen's Union Local 37 v. Boyd*, 347 U.S. 222, 224 (1954) ("Determination of the

prudential underpinnings. The underlying premise of the abstention cases, for example, is that federal courts should not hold state statutes unconstitutional based on speculation concerning their *possible* applications if better information can be obtained concerning their *actual* reach.[44] Similarly, the thrust of such recent holdings as *New York v. Ferber*, *supra*, and *Brockett v. Spokane Arcades, Inc.*, *supra*, is that plaintiffs who challenge state statutes must do so based on how the statute is actually applied to them—not to how it might or might not be applied to someone else.

The plaintiffs and the lower courts proceeded upon the assumption that they did not need to concern themselves with facts, context, legislative intent, and possible limiting constructions because the Act was "overbroad" and " 'does not aim specifically at evils within the allowable areas of [government] control, but * * * sweeps within its ambit other activities that constitute an exercise of protected expressive * * * rights.' " App. B at 54a-55a (quoting L. Tribe, *Constitutional Law*, § 12-24 at 710 (1978)). But, while "the First Amendment needs breathing space" (*Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973)), the overbreadth doctrine does not permit federal courts to "survey the statute books and pass judg-

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scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function"). *See also Kleppe v. New Mexico*, 426 U.S. 529 (1976); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945); *Muskrat v. United States*, 219 U.S. 346 (1910).

[44] *See Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. at 2804-05 (1985) (O'Connor, J., concurring) (state obscenity statute concerns important state issues, and federal courts should abstain from entertaining a facial attack if the statute is fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question).

ment on laws before the courts are called upon to enforce them." *Younger v. Harris*, 401 U.S. 50, 52 (1971).[45] The doctrine is " 'strong medicine' and [is] employed * * * with hesitation, and then only as a last resort." *New York v. Ferber*, 458 U.S. at 769 (quoting *Broadrick v. Oklahoma*, 413 U.S. at 613).

Moreover, the overbreadth doctrine simply does not apply unless the "overbreadth is incurable and would taint all possible applications of the statute." *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. at 2802. As shown in Part I above, there is a substantial area within which the State of Utah may legitimately regulate the dissemination of indecent cablecast material. Therefore, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. at 616; *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. at 2802.

Both in their constitutional and their prudential dimensions, the above principles govern this case. There is serious question whether a facial challenge to the Act is a ripe case or controversy within the power of Article III courts to decide. This suit was filed the day after enactment of the statute. The Act has never been enforced. The plaintiffs and the lower courts have proceeded on the basis of assumption as to the kinds of materials it would prohibit, and the hours of the day they would be prohibited. Finally, even if the courts below had the constitutional power facially to invalidate the Act in such an unfocused posture, they clearly should not have done so.

In its current setting, there is only one issue in this case that federal courts have the unclouded power to decide. In *Pacifica*, this Court held that indecent material conveyed by a pervasive medium possessing the po-

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[45] *See also Watson v. Buck*, 313 U.S. 387, 395-401 (1941).

tential for adverse impact on children and unconsenting adults in the home can be channeled notwithstanding the fact that it is not obscene. The narrow question—indeed, the only question—which can and should be decided at this time is whether, under *Pacifica*, the State of Utah has *any* constitutional authority to channel the cablecasting of indecent material so as to minimize its imposition on children and unwilling adult viewers. As shown in Part I above, that question should be resolved in favor of the State.

III. 42 U.S.C. § 1988 Does Not Authorize The Award Of Attorneys' Fees To Wealthy Corporate Litigants Who, Absent The Fee Provision, Would Nevertheless Have Pressed Their Claims

The lower courts improperly awarded costs and attorneys' fees to the cable company plaintiffs pursuant to 42 U.S.C. § 1988 (1982).[46] The award of such fees to billion-dollar corporations who would have litigated their position even without the statute is contrary to congressional intent and conflicts with decisions of the United States Court of Appeals for the Second Circuit. *Zarcone v. Perry*, 581 F.2d 1039, 1044 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *Wheatley v. Ford*, 679 F.2d 1037, 1040 (2d Cir. 1982).

The Senate and House Reports on the bills proposing § 1988, as well as the floor remarks of the legislators who spoke in favor of the bills, repeatedly identified the bills' central purpose to be the elimination of the financial hurdle that discourages a person with "little or no money" from hiring a lawyer. S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976); 121 Cong. Rec. 26806 (1975) (remarks of Sen. Tunney). *See also* H.R. Rep. No. 1558,

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[46] Should this Court agree with appellant that the lower courts erred in invalidating the Utah Act, it need not reach the propriety of the fee award to wealthy corporate litigants because the cable company plaintiffs would no longer be prevailing parties.

94th Cong., 2d Sess. 1, 3, 4 (1976); 122 Cong. Rec. 31471, 35118, 35126, 35128, 35127 (1976) (remarks of Sen. Mathias, Rep. Seiberling, Rep. Fish, Rep. Holtzman and Rep. Jordan). These materials make clear that the statute simply does not apply to wealthy litigants who would press their position without regard to the prospect of recovering their costs.

The appellant submitted substantial evidence to the trial court establishing that the cable companies are not in the category of those who have "little or no money." [47] It was undisputed below that, in 1984, Time, Inc., owner of Home Box Office, Inc., had assets of over $2.6 billion and that TCI, the owner of the other four cable company plaintiffs, had assets of over $1.5 billion. The trial court noted that there is no question but that the cable company plaintiffs' assets are substantial. App. C at 82a.

The cable company plaintiffs, moreover, would have brought this suit even without the prospect of a fee award. HBO's affluence, for example, has enabled it to take part in a substantial amount of similar litigation across the nation, including *HBO v. Wilkinson*, *supra*, and *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985). In *HBO v. Wilkinson*, the district court awarded no fees to HBO or the other cable plaintiffs, although fees were sought. The past failure to recover fees did not deter HBO from bringing this suit. Fees here would be a windfall, totally beyond the purview of the congressional intent underlying § 1988.

The lower courts' action in awarding fees to the cable company plaintiffs despite their wealth also conflicts with decisions of the Second Circuit. That court, in *Zarcone v. Perry*, 581 F.2d at 1044, stated that

> the Supreme Court has made it clear that in determining whether attorneys' fees should be awarded to

[47] *See* Exhibits and Affidavits attached to the Defendant's Opposition to Plaintiffs' Motion for Fees, Rec. 765-776.

> a prevailing civil rights plaintiff, the principal factor to be considered by the trial judge in exercising his discretion is whether a person in the plaintiff's position would have been deterred or inhibited from seeking to enforce civil rights without an assurance that his attorney's fees would be paid if he were successful.

The rule has been reinforced in *Wheatley v. Ford*, 679 F.2d at 1040, where the Second Circuit concluded that the inquiry preceding the award of fees under § 1988 should be "whether a plaintiff in a similar situation would be deterred from bringing the action absent the likelihood of a fee award." [48]

Under the facts of this case, the Second Circuit almost certainly would have denied fees to the cable company plaintiffs. The difference between the Second Circuit and the courts below on this issue is that the Second Circuit has followed congressional intent in applying § 1988, while the courts below have not.

Finally, beyond the fact that the award of attorneys' fees to the cable company plaintiffs ignores congressional intent and conflicts with other precedent, it is simply unjust to impose the burden of such fees on the citizens of the State of Utah. The State, in express reliance on decisions of this Court which establish the constitutionality of careful efforts to channel indecent materials away from susceptible children and unwilling adults, enacted the Cable Television Programming Decency Act. Before the State had the opportunity to establish the sphere

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[48] Although the court of appeals categorized *Zarcone* and *Wheatley* as establishing a "'bright prospects' rule" (App. A at 5a n.3), appellant does not rely on a narrow "bright prospects" rationale. The "bright prospects" rule, which inquires whether there is a "likelihood of success * * * sufficient to attract competent counsel on a contingent fee basis" (*ibid.*), was developed by the Second Circuit subsequent to its decision in *Zarcone* and is narrower than the rule announced there, upon which appellant relies.

within which the Act would operate, the cable company plaintiffs brought suit claiming that there was no legitimate scope whatsoever to the Act. All the State has done in this litigation is to defend, in good faith, a legislative decision that—unless this Court confines *Pacifica* to its precise facts—is certainly not unconstitutional in all of its possible applications. This Court should not permit the lower courts to construe 42 U.S.C. § 1988 so as to require the taxpayers of a State to reimburse wealthy business interests their attorneys' fees any time they successfully challenge regulatory actions that have been patterned after this Court's decisions.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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January 6, 1987

CERTIFICATE OF SERVICE

Served this 6th day of January, 1987, by mailing three copies of the Jurisdictional Statement and Appendix, postage prepaid, to the following, which includes all parties required to be served.

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No. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DAVID L. WILKINSON,
Attorney General of the State of Utah,
Appellant,

v.

CONNIE R. JONES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

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APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 85-2157

CONNIE R. JONES; LYNN F. JONES; CAROLINE A. SNOW; RALPH MCCLEARY; KAY ULRICH; ED ULRICH; WAYNE WILLIAMS, as individuals and as representative of a class of persons similarly situated; COMMUNITY TELEVISION OF UTAH, INC.; COMMUNITY CABLE OF UTAH, INC.; UTAH SATELLITE, INC.; and WASATCH COMMUNITY T.V., INC.,

Plaintiffs-Appellees,

HOME BOX OFFICE, INC.,
Plaintiff-in-Intervention-Appellee,

v.

HONORABLE DAVID L. WILKINSON, Attorney General of the State of Utah, in his official capacity and as representative of a class of all persons empowered to enforce the Cable Television Programming Decency Act (S.B. 309),

Defendant-Appellant,

MORALITY IN MEDIA, INC., NATIONAL CABLE TELEVISION ASSOCIATION, INC., THE FREEDOM OF EXPRESSION FOUNDATION, INC.,

Amici Curiae.

Appeal from the United States District Court
for the District of Utah
(D.C. Nos. C-83-0551A and C-83-0581A)

[Filed Sept. 8, 1986]

Charles A. Hobbs, Special Assistant Attorney General for the State of Utah, Washington, D.C., and David L. Wilkinson, Attorney General of the State of Utah, Salt Lake City, Utah (Robert N. Parrish, Assistant Attorney General; Theodore A. Shields, of Hobbs, Straus, Dean & Wilder, Washington, D.C., of counsel, with them on the briefs) for Defendant-Appellant.

Bryan L. McDougal, Salt Lake City, Utah, George H. Shapiro of Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C., and Patricia A. O'Rorke of the American Civil Liberties Union, Salt Lake City, Utah (Donald B. Holbrook and LeGrand R. Curtis, Jr., of Jones, Waldo, Holbrook & McDonough, Salt Lake City, Utah, James P. Mercurio and Gerald E. Oberst, Jr. of Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C., and, of counsel, Faith Wender of Home Box Office, Inc., Los Angeles, California, with them on the brief) for Plaintiffs-Appellees.

Lloyd C. Eldredge, Salt Lake City, Utah, filed a brief for amicus curiae Morality in Media, Inc.

Brenda L. Fox and Seth A. Davidson, Washington, D.C., filed a brief for amicus curiae National Cable Television Association, Inc.

David M. Hunsaker of Putbrese & Hunsaker, McLean, Virginia, and M. Joel Bolstein and Craig R. Smith of Freedom of Expression Foundation, Inc., filed a brief for amicus curiae The Freedom of Expression Foundation, Inc.

Before LOGAN and BALDOCK, Circuit Judges, and SAFFELS, District Judge.*

---

* Honorable Dale E. Saffels, United States District Judge for the District of Kansas, sitting by designation.

PER CURIAM.

Several Utah cable television subscribers, as individuals and as representatives of a class of persons similarly situated, and several Utah cable television operators filed separate suits for declaratory and injunctive relief, challenging the validity, under federal law and the United States Constitution, of the Utah Cable Television Programming Decency Act, Utah Code Ann. §§ 76-10-1701 to -1708 (1983) (the Act). The suits named Utah Attorney General David L. Wilkinson defendant in his individual and official capacities and as representative of the class of Utah officials empowered to enforce the Act. The cases were consolidated and Home Box Office, Inc., a national cable television company, was permitted to intervene as a plaintiff.

The Act treats the showing by cable television systems, or pay-for-viewing television programming, of "indecent material" as a nuisance, punishable by fines and money forfeitures. Under the Act, "indecent material" includes the visual or verbal depiction or description of human sexual or excretory organs or functions, including exposure of genitals, pubic area, buttocks, or the showing of any portion of the female breast below the top of the nipple. The depiction is prohibited if the "average person applying contemporary community standards for cable television . . . would find [it] is presented in a patently offensive way for the time, place, manner and context . . . ." *Id.* § 76-10-1702(4)(d).[1]

---

[1] The entire definition is as follows:

"(4) 'Indecent material' means a visual or verbal depiction, display, representation, dissemination, or verbal description of:

(a) A human sexual or excretory organ or function;

or

(b) A state of undress so as to expose the human male or female genitals, pubic area, or buttocks, with less than a fully

On cross motions for summary judgment, the district court found for the plaintiffs. *Community Television of Utah, Inc.* v. *Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985). In its opinion the court focused on the federal preemption question raised by *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984), and by Congress' subsequent enactment of The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (codified at 47 U.S.C. §§ 521-559). The district court found that federal law preempts state regulation of the content of cable television programming, except that under federal law cable operators may still be held liable by a state for violating "obscenity . . . or other similar laws." *Wilkinson*, 611 F. Supp. at 1103-04 (quoting 47 U.S.C. § 558). Finding that the Utah statute exceeded this limited power,[2] the district court held that the federal act preempted the Utah statute. *Wilkinson*, 611 F. Supp. at 1104, 1117. It also held that the Utah statute "is unconstitutionally overbroad and vague, and void on its face." *Id.* at 1117.

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opaque covering, or showing of the female breast with less than a fully opaque covering of any portion below the top of the nipple; or

(c) An ultimate sexual act, normal or perverted, actual or simulated; or

(d) Masturbation

which the average person applying contemporary community standards for cable television or pay-for-viewing television programming would find is presented in a patently offensive way for the time, place, manner and context in which the material is presented."

Utah Code Ann. § 76-10-1702(4).

[2] The statute would prohibit, for example, a "verbal description of . . . male . . . buttocks . . . which the average person . . . would find . . . patently offensive." *See supra*, note 1. The State of Utah admits that it intends to regulate matters that go beyond outright "obscenity."

The district court has written a comprehensive opinion with which we agree, and to which we can add little of value. We affirm its judgment on the basis of the reasons stated in the opinion.

We must, however, discuss one issue: the cable television companies' entitlement to attorney's fees under 42 U.S.C. § 1988. Defendant does not object to the district court's award of attorney's fees to the individual plaintiffs, but does challenge its award to the corporate plaintiffs. Defendant argues that 42 U.S.C. § 1988 was designed only to provide an incentive and means to secure counsel for those who could not otherwise afford to litigate for vindication of their civil rights. He alleges that the plaintiff corporations here are "deep pocket" litigants, who can afford to pay their own attorneys. He relies broadly on *Zarcone* v. *Perry*, 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). *Zarcone* stated that a trial judge considering a § 1988 fee award should look to "whether a person in the plaintiff's position would have been deterred or inhibited from seeking to enforce civil rights without assurance that his attorneys' fees would be paid if he were successful." *Id.* at 1044.[3]

---

[3] *Zarcone* specifically established a "bright prospects" rule, denying attorneys' fees when the likelihood of success was sufficient to attract competent counsel on a contingent fee basis. 581 F.2d at 1044; *see also Buxton v. Patel*, 595 F.2d 1182, 1184 (9th Cir. 1979). In the instant case, in which declaratory and injunctive relief is sought, no contingent fee contract is feasible. The "bright prospects" rule is thus not relevant. Even if it were, this circuit previously has rejected the "bright prospects" rule. *See Cooper v. Singer*, 719 F.2d 1496, 1501 (10th Cir. 1983) (en banc); *J.&J. Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1473-74 (10th Cir. 1985).

The Second Circuit has narrowed the authority of *Zarcone*. *See Wheatley v. Ford*, 679 F.2d 1037, 1040 (2d Cir. 1982); *Milwe v. Cavuoto*, 653 F.2d 80, 82-83 (2d Cir. 1981). The Ninth Circuit has narrowed the authority of *Buxton*. *See Hamner v. Rios*, 769 F.2d 1404, 1407 (9th Cir. 1985).

The Supreme Court has declared that the prevailing party in a civil rights case "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968); *see also Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983) (reaffirming general rule). In *Love* v. *Mayor of Cheyenne*, 620 F.2d 235, 237 (10th Cir. 1980), we did reserve the issue of whether a plaintiff's ability to pay is a special circumstance that can render a fee award unjust. But our en banc opinion in *Cooper* v. *Singer*, 719 F.2d 1496 (10th Cir. 1983), answered that question. In *Cooper* we decided that the presence of a contingent fee contract would not limit the amount of a fee award in a civil rights case. *Id.* at 1507. En route to that holding, in addition to expressing disapproval of *Zarcone*, we specifically stated that § 1988 has purposes other than encouraging lawyers to take on a case, such as "penalizing obstructive litigation by civil rights defendants and generally deterring civil rights violations." *Id.* at 1501. These other purposes of § 1988 compel us to say that the ability of a party to bring a suit without a fee award is not a special circumstance rendering a fee award unjust. *Accord Duncan* v. *Poythress*, 777 F.2d 1508, 1511-14 (11th Cir. 1985) (en banc) (lawyer-litigant in civil rights case, representing self and thus arguably not needing § 1988 encouragement to bring suit, not a special circumstance, defeating fee award); *Ackerley Communications, Inc.* v. *City of Salem*, 752 F.2d 1394, 1397 (9th Cir.) (ability to pay for lawyer not a special circumstance), *cert. denied*, —— U.S. ——, 105 S. Ct. 3503 (1985); *Milwe* v. *Cavuoto*, 653 F.2d 80, 83 (2d Cir. 1981) (ability to pay not a special circumstance); *Ellwest Stereo Theater, Inc.* v. *Jackson*, 653 F.2d 954, 956 (5th Cir. 1981) (ability to pay not a special circumstance).

Defendant separately contends that his good faith belief in the constitutionality of his actions should shield

him from liability for attorneys' fees. But a defendant's good faith belief in the legality or constitutionality of its action has been rejected as a special circumstance warranty denial of attorney's fees. *J.&J. Anderson, Inc.* v. *Town of Erie*, 767 F.2d 1469, 1474 (10th Cir. 1985); *Love* v. *Mayor of Cheyenne*, 620 F.2d 235, 236 (10th Cir. 1980); *Espino* v. *Besteiro*, 708 F.2d 1002, 1005 (5th Cir. 1983); *see Hutto* v. *Finney*, 437 U.S. 678, 693 (1978).

The standard the district court applied in awarding fees was thus correct. Its actual fee award involved no abuse of discretion.

We therefore affirm the district court's award of attorney's fees, as well as its judgment on the merits.

AFFIRMED.

BALDOCK, Circuit Judge, specially concurring.

The per curiam opinion affirms the judgment on the basis of the district court's opinion. *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985). Although precedent compels me to agree that the Utah Cable Television Programming Decency Act (Cable Decency Act), Utah Code Ann. §§ 76-10-1701 to 76-10-1708 (1986 Supp.) is both vague and overbroad, I respectfully find that the Cable Decency Act does not withstand constitutional challenge on somewhat different and narrower grounds than the district court. I write separately because I do not agree with this court's apparent conclusion that federal law preempts state regulation of sexually oriented content which is not obscene. Per Curiam Opinion at 4 and n.2. Nor do I agree that the first amendment forecloses the regulation of indecency [1] on cable television, provided that the regulation

---

[1] Before determining whether indecent material as defined in the Cable Decency Act, Utah Code Ann. § 76-10-1702(4) (see the Per Curiam Opinion at 3, n. 1), may be regulated, it is helpful to consider a narrower definition of indecency developed by the F.C.C. in *Pacifica Foundation*, 56 F.C.C.2d 94, 98 (1975), *on reconsideration*, 59 F.C.C.2d 892 (1976), *rev'd, Pacifica Foundation v. F.C.C.*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726, 732 (1978). The legislative history of the Cable Communications Policy Act of 1984 indicates that Congress was aware of the concept of indecency in the context of the *Pacifica* decision. H.R. Rep. No. 934, 98th Cong. 2d Sess. 69-70, *reprinted in*, 1984 U.S. Code Cong. & Ad. News 4655, 4706-4707 ("The Committee notes that the Supreme Court has held with respect to over-the-air that broadcasting speech which is not obscene, but nevertheless is 'indecent', may be subject to government-imposed time place and manner restrictions due to the unique prevasiveness [sic] of the over-the-air broadcast medium. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)."). The F.C.C.'s concept of indecency in *Pacifica* is carefully considered, is tailored to the nature of the audience receiving television or radio service and seems to balance the right of the government to protect the welfare of children while not substantially interfering with the viewing rights of adults. Thus, indecency may be defined as a description or depiction, which is patently offensive as measured

is a time, place and manner restriction that is narrowly drawn and exists for the protection of minors.

I. Preemption

The Utah Cable Decency Act is preempted partially by the Federal Cable Communications Policy Act of 1984, 98 Stat. 2779-2806, insofar as it applies to indecent programming on commercial (leased access) channels or public, educational or governmental (P.E.G.) channels. Cable operators [2] generally are required to set aside certain channels for commercial use by persons unaffiliated with the operator and also for public, educational or governmental use. *See* 47 U.S.C. §§ 531, 532. The cable operator is without editorial control over these channels. 47 U.S.C. §§ 531(e), 532(c)(2). But the Utah Cable Decency Act could be used to impose civil liability on cable operators for indecent programming on leased access or P.E.G. channels, notwithstanding that cable operators are without editorial control over programming appearing on these channels. This is because under the Utah Act a cable operator could be considered to have "distributed" indecent material, thereby creating a nuisance, even though the operator was without editorial

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by contemporary community standards for the broadcast medium, of sexual or excretory activities or organs, at times of the day when there is a reasonable risk that children may be in the audience. *Pacifica Foundation*, 56 F.C.C.2d at 98. An important limitation on this concept is that a patently offensive description or depiction with literary, artistic, political or scientific value could be broadcast, preceded by warnings, during the late evening hours when the number of children in the audience was minimized. *Id.* at 98-100.

[2] A cable operator is "any person or group of persons (A) who provides cable service over a cable system and directly through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system." 47 U.S.C. § 522(4).

control over the indecent material.[3] The federal act expressly provides that cable operators shall not be held liable for the content of programs on leased access or P.E.G. channels. 47 U.S.C. § 558. In those instances where a state provision conflicts with a federal statute, the federal statute prevails. U.S. Const. art. VI, cl. 2; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947); *see also* H. Hart & H. Wechsler, The Federal Courts and the Federal System 435 (1953).

The cable operator is without specific editorial control of leased access channels so as to insure that cable systems will provide diverse programming. 47 U.S.C. §§ 521(4), 532(c)(2); H.R. Rep. No. 934, 98th Cong., 2d Sess. 47-52, *reprinted in*, U.S. Code Cong. & Ad. News 4684-4689. The franchising authority,[4] however, may

---

[3] The Cable Decency Act proscribes the knowing distribution of indecent material as a continuing course of conduct:

> 76-10-1703. Distribution of indecent material as nuisance.
>
> A person shall be deemed to have maintained a nuisance when, as a continuing course of conduct, he knowingly distributes indecent material within this state over any cable television system or pay-for-viewing television programming.

The statutory refinition of distribution under the Utah Act is very broad and includes the transmission and retransmission of cable signals, without regard to whether an operator maintained editorial control over programming.

> 76-10-1702. Definitions.
>
> (2) "Distribute" means to send, transmit, retransmit, telecast, disseminate, or cablecast by any means, including by wire or satellite, or to provide material to send, transmit, retransmit, telecast, disseminate, or cablecast.

Thus, to the extent that the Utah Act could be used to impose civil liability on a cable operator for indecent programming over which he has no editorial control, the Utah Act is preempted. 47 U.S.C. § 558.

[4] The franchising authority means "any governmental entity empowered by Federal, State or local law to grant a franchise." 47 U.S.C. § 522(9).

regulate program content insofar as such content is not protected by the Constitution. 47 U.S.C. § 532(h). Likewise, the cable operator is without editorial control of those cable channels designated for public, educational or governmental use, although a franchising authority and a cable operator may agree that certain cable services unprotected by the Constitution shall not be provided or shall be provided subject to conditions. 47 U.S.C. § 544(d)(1).

Cable operators retain editorial control over their remaining channels, so it is necessary to consider whether the Utah Cable Decency Act might apply to plaintiff cable operators based on programming carried on those channels. 47 U.S.C. § 558 provides:

> Criminal and civil liability
>
> Nothing in this subchapter [V-A] shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or *other similar laws*, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 532 of this title or under similar arrangements. (Emphasis added.)

Section 558 preserves state and local power to regulate certain types of expression on regular cable channels. Determining whether the phrase "other similar laws" includes laws pertaining to indecency requires review of the legislative history of the provision. *In re George Rodman, Inc.*, 792 F.2d 125, 128 n.8 (10th Cir. 1986) (appropriate to consider legislative history when the purpose, intent or object of the statute is unclear from the language used therein).

The House Committee Report indicates that laws regulating indency would not be preempted should those laws conform to constitutional requirements.

> Section [558] that nothing in this title shall be deemed to affect the criminal or civil liability of cable programmers or cable operators with respect to Federal (including FCC regulations), state and local laws not inconsistent with this title relating to libel, slander, obscenity, incitement, false or misleading advertising or other similar areas of the law.
>
> . . .
>
> The Committee does not intend to affect liability which might result from other speech which may be held by the courts to be unentitled to constitutional protection (as discussed in relation to section [544(d)]).

H.R. Rep. No. 934, 98th Cong. 2d Sess. 95, *reprinted in*, 1984 U.S. Code Cong. & Ad. News, at 4732. The Committee discussion pertaining to § 544(d)[5] indicates that Congress was well aware of the uncertainty surrounding the regulation of indecency on cable television in the ab-

---

[5] 47 U.S.C. § 544(d) provides:

> Cable service obscene, indecent or otherwise unprotected by Constitution
>
> (1) Nothing in this subchapter [V-4] shall be construed as prohibiting a franchising authority and a cable operator from specifying, in a franchise or a renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States. 2(A) In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operators shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.
>
> (B) Subparagraph (A) shall take effect 180 days after the effective date of this subchapter.

sence of a Supreme Court ruling on the constitutionality of such regulation.

> Subsection (d) addresses the issues of regulation of obscene programming services. The Committee is extremely concerned with the dissemination of programming containing explicit sexual material which might be offensive to many cable subscribers. The Committee is particularly concerned about the availability of such programming to child viewers. The Committee is also very mindful of the constraints the First Amendment imposes in terms of the permissibility of governmental regulation of program content.
>
> . . .
>
> The provision covers not only obscene speech, but other speech which may also be unprotected by the Constitution of the United States (such as "fighting words" and speech which presents a "clear and present danger" to public order). This provision would also permit changing constitutional interpretations to be incorporated into the standard set forth in [544](d)(1) should those judicial interpretations at some point in the future deem additional standards, such as indecency, constitutionally valid as applied to cable.

H.R. Rep. No. 934, 98th Cong. 2d Sess. 69, *reprinted in*, 1984 U.S. Code Cong. & Ad. News 4655, 4706. The Committee was aware that indecency had been regulated in the context of mid-afternoon over-the-air broadcasting in *F.C.C. v. Pacifica*, 438 U.S. 726 (1978), but that three lower federal court decisions had determined that an indecency standard could not be applied constitutionally to cable television, *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982); *Cruz v. Ferre*, 571 F. Supp. 125 (S.D. Fla.

1983), *aff'd*, 755 F.2d 1415 (11th Cir. 1985). H.R. Rep. No. 98-934 at 70, *reprinted in*, 1984 U.S. Code Cong. & Ad. News at 4707.

The House Committee perceived a problem with the availability of obscene or indecent programming and discussed one alternative to restrict its availability to children.

> The Committee recognizes with respect to cable the need to provide for the restriction, within constitutionally permissible grounds, on the availability of programming, which might not be obscene, but is nonetheless indecent, if children are going to be adequately protected from exposure to such material. Thus, [544](d)(2)(A) provides one method for dealing with obscene or indecent programming by requiring every cable operator to provide to any subscriber upon request a device (often referred to as a "lock box") which is capable of restricting the viewing, during any period selected by the subscriber, of a cable service which contains obscene or indecent behavior.

Id. The Committee was of the view that "lock boxes" were one way to restrict the availability of obscene or indecent programming without affecting the first amendment rights of cable operators, programmers and viewers. There was no suggestion, however, that "lock boxes" were intended to be the only method for dealing with either obscenity or indecency.

Thus, the Utah Cable Decency Act insofar as it could apply to cable operators based on indecent programming on leased access or P.E.G. channels is preempted by federal law. This does not preclude the franchising authority, however, from exercising some control over constitutionally unprotected indecent programming on these channels. Whether the Utah Cable Decency Act may be used to regulate indecency in other situations (i.e. cable oper-

ators on regular channels and cable programmers on all channels) depends upon whether the Act is consistent with the first amendment. If the Utah Act violates the first amendment it is also preempted because § 558 only allows the states and localities to regulate speech which is unprotected by the Constitution.

II. First Amendment Considerations

It is now well settled that obscenity is not protected by the first amendment. *Roth v. United States*, 354 U.S. 476, 485 (1957). Material is obscene if the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest and depicts or describes, in a patently offensive way, specified sexual conduct and lacks serious literary, artistic, political or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973). That portion of the Utah Criminal Code pertaining generally to the dlistribution of pornographic material, i.e., Utah Code Ann. §§ 76-10-1201(11), 76-10-1203(1) & 76-10-1204 (1978 Rep. Vol)., encompasses that which is obscene under the *Miller* test. Although a more specific Utah statute purporting to regulate distribution of pornographic and indecent material on cable television, Utah Code Ann. § 76-10-1229 (1986 Supp.) was found unconstitutional in *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982), it appears that obscenity on cable television is within the purview of Utah's general statute criminalizing the distribution of pornographic material.

A fundamental issue raised by this appeal is whether sexually oriented material which is indecent is entitled to *unlimited* constitutional protection merely because it is not obscene. The district court resolved this question by holding that the *Miller* obscenity test is the outer limit of consent-based regulation of sexually oriented material on cable television. 611 F.Supp. 1107-1109. To be sure, the Supreme Court has recognized that the portrayal of

sex is not sufficient reason to deny material first amendment protection. *Roth v. United States*, 354 U.S. at 487. But the degree of protection may differ. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion) ("[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . ."). Both the content and context of speech must be considered in deciding the extent of first amendment protection. *F.C.C. v. Pacifica*, 438 U.S. at 755. But reasonable time, place and manner restrictions on sexually oriented material have been upheld in several cases, suggesting that regulation of indecent material for the protection of minors is not automatically barred by the first amendment.

In *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925 (1986), the Court upheld a city ordinance which prohibited adult theaters from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park, or school. Although regulation based on content presumptively violates the first amendment, the ordinance was characterized as an allowable time, place and manner regulation which was content neutral because it was aimed not at the content of the films shown at such theaters, but rather at the secondary effects of such theaters on the surrounding community. *Renton*, 106 S.Ct. at 928-29. The city could look to evidence from other communities concerning the "adverse effects of the presence of adult motion picture theaters on neighborhood children and community improvement efforts," *Northend Cinema, Inc. v. City of Seattle*, 585 P.2d 1153, 1156 (Wash, 1978), *cert. denied*, 441 U.S. 946 (1979), and enact the ordinance to further the substantial governmental interest of preserving the quality of urban life. *Renton*, 106 S.Ct. at 930-31. The ordinance also met the

other requirement of a valid time, place and manner restraint: that there be reasonable alternative avenues of communication. Five percent of the land area of the city could be used for adult theaters and even though such land might not be commercially attractive, the ordinance did not have "the effect of suppressing, or greatly restricting access to, lawful speech." *Renton*, 106 S.Ct. at 932 (quoting *Young v. American Mini Theaters, Inc.*, 427 U.S. at 71 n. 35 (plurality opinion)).

In *New York v. Ferber*, 458 U.S. 747, 764 (1982), the Court upheld a New York statute prohibiting a person from knowingly promoting a sexual performance by a child under 16 by distributing material which depicts such performances. Significantly, the Court determined that the first amendment test for the regulation of child pornography differed from the obscenity standard in *Miller*; the work need be considered as a whole, need not appeal to the prurient interest of the average person, and need not be portrayed in a patently offensive manner. 458 U.S. at 764. The states are entitled to greater leeway in regulating child pornography for a number of reasons, one of which is that the *Miller* test for obscenity, with its requirements that the work be taken as a whole, that the sexual depiction appeal to the prurient interest and that the depiction be patently offensive, simply is ineffective in reducing the sexual exploitation and abuse of children which is "a government objective of surpassing importance." 458 U.S. at 757, 761.

The district court correctly pointed out that the Cable Decency Act does not conform to the *Miller* obscenity test because there is no requirement that a work taken as a whole appeal to the prurient interest and lack serious literary, aristic, political or scientific value. 611 F.Supp. at 1108. It also determined that the *Miller* requirement that the work depict or describe sexual conduct in a patently offensive way is missing in the Cable Decency Act. *Id.* Section 76-10-1702(4) defines indecent material

with reference to the following depictions or descriptions: (a) a human sexual or excretory organ or function, (b) a state of undress (nudity), (c) an ultimate sexual act, or (d) masturbation. There is also a requirement that such depictions or descriptions be patently offensive. Utah Code Ann. § 76-10-1702(4). I cannot agree that this list fails to satisfy the "patently offensive sexual conduct" element of the *Miller* test. In discussing this element, the Court declined to propose regulatory schemes for the States, but did give a few examples:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals.
>
> Sex and nudiity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places (Footnote omitted.)

Miller v. California, 413 U.S. at 25. When the Utah statute is considered in light of the above, I think it does cover "patently offensive sexual conduct," which can include nudity. In any event, amicus Morality in Media suggests that the *Miller* test is inadequate to regulate sexually oriented material on cable television because of its requirement that the work be taken as a whole and that the work appeal to the prurient interest. When one considers the nature of television and the number of minors in the audience, it is apparent that there is highly objectionable sexually oriented material presented on cable television during family viewing hours notwithstanding that such material might not appeal to a minor's prurient interest (or could not because of young age) and might

not be obscene when taken as a whole. *See* Record Vol. III at 451.

The Court also has approved prohibiting a minor's access to sexually oriented magazines, even though those magazines were not obscene as to adults but were as to minors. *Ginsberg v. New York*, 390 U.S. 629 (1968). This has become known as the concept of variable obscenity. Minors have a more restricted right than adults to sexualy oriented material. It is permissible to determine what minors may view with reference to prevailing standards in the adult community with respect to what is suitable for minors. *Ginsberg*, 390 U.S. at 635. Implicit in a test relying on adult perceptions to determine whether material is suitable for minors is the recognition that most sexually oriented material is aimed primarily at sexually mature adults. *Ginsberg*, 390 U.S. at 635 n.4. Many states, including Utah,[6] have enacted statutes which

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[6] Utah Code Ann. § 76-10-1206 (1978 Rep. Vol.) provides in pertinent part:

> Dealing in harmful material to a minor.—(1) A person is guilty of dealing in harmful material when, knowing that a person is a minor, or having failed to exercise reasonable care in ascertaining the proper age of a minor, he:
>
> (a) Knowingly distributes or offers to distribute, exhibits or offers to exhibit, any harmful material to a minor; . . .

The definition of harmful to minors contained in Utah Code Ann. § 76-10-1201 (1978 Rep. Vol.) reflects the idea that what is not obscene as to adults may well be so as to minors:

> Definitions.—For the purpose of this part:
>
> (11) "Harmful to minors" means that quality of any description or representation, in whatsoever form, of nudity, sexual conduct, sexaul excitement, or sado-masochistic abuse when it:
>
> (i) Taken as a whole, appeals to the prurient interest in sex of minors;
>
> (ii) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
>
> (iii) Taken as a whole, does not have serious value for minors. Serious value includes only serious literary, artistic, political or scientific value for minors.

proscribe the distribution of material which is obscene as to minors.

Recently, two circuits have upheld ordinances which restrict not only the distribution to minors of sexually oriented material which is obscene as to them, but also the display of such material. The restricted material is not necessarily obscene as to adults, yet the restrictions were upheld. In *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983), we viewed such restrictions as time, place and manner regulations. The ordinance at issue allowed the display of sexually oriented material harmful to minors in display racks which concealed the lower two-thirds of the material from view. The court rejected the argument that the ordinance was overbroad because it restricted the access of adults and older minors to constitutionally protected publications:

> It is true that compliance with the ordinance will to some degree restrict the viewing by adults of materials which are, as to adults, constitutionally protected. However, the restriction is reasonable and does not offend the First Amendment.

721 F.2d at 1288. Although the ordinance was a content-based regulation, it did not suppress or greatly restrict access to protected speech and was "justified by the substantial governmental interest in protecting minors from exposure to harmful material." *Id.*

Similarly, the Eighth Circuit has considered an ordinance prohibiting the display of sexually oriented material harmful to minors unless the material is in a sealed wrapper. *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985). The challenged ordinance also required that any cover, which standing alone would be harmful to minors, must be blocked from view by an opaque cover if minors would be able to view it otherwise. Appellants argued that the sexually oriented material had to be considered as a whole

and that the ordinance was overbroad because that part regulating only the covers did not consider the material as a whole. The court of appeals rejected this argument and concluded that "the 'taken as a whole' requirement has no application outside the context of an attempt totally to suppress obscene material or criminally to prosecute someone for the dissemination of that material." 780 F.2d at 1393. Because adults still may review and purchase the material, the "taken as a whole" requirement was not applicable to the display regulations.

The eighth Circuit held that the ordinance was a reasonable time, place and manner regulation because it furthered significant governmental interests and allowed for reasonable alternative methods of communication. The ordinance sought to promote the well-being of youth and support parental authority within the household but did not prohibit adults from viewing and purchasing sexually oriented material. The court stated:

> Any burden here is the result of the permissible regulation of material that is obscene as to minors. The restriction in relation to adults is merely an incidental effect of the permissible regulation and is minimal in its impact. Adults are still free to request a copy of restricted material to view from a merchant or to peruse the material in adults only bookstores or in segregated sections of ordinary retail establishments. More significantly, adults are still able to view any of the material in a free and unfettered fashion by purchasing it. The continued availability of these materials to adults for purchase under the ordinance weighs strongly in favor of the ordinance's constitutionality.

780 F.2d at 1395. The Fourth Circuit in *American Booksellers Ass'n, Inc. v. Virginia*, 792 F.2d 1261, 1266 (4th Cir. 1986), appears to have reached the opposite conclusion in determining that alternative display methods for sexu-

ally oriented material would be ineffective or unduly burdensome on first amendment rights.

Thus, there is authority to suggest that the *Miller* adult obscenity standard is not the exclusive test to be applied to the regulation of sexually oriented material. Whether non-obscence sexually oriented material can be regulated in the cable television context depends in large part upon how cable television is characterized as a medium of expression. The Court has stressed that each medium of expression is unique insofar as first amendment analysis is concerned. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981); *Joseph Burtsyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952).

For several reasons, traditional broadcasting has received the most limited first amendment protection. *F.C.C. v. Pacifica*, 438. U.S. at 748. One reason for this is the physical scarcity of broadcast frequencies; government allocation and regulation of broadcast frequencies is necessary to serve the public interest. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 375-76, 396-400 (1969). In the past, a broadcast license has been described as a public trust because the broadcaster has been granted exclusive use of a frequency in the public domain. *Office of Communication of United Church of Christ v. F.C.C.*, 359 F.2d 994, 1003 (D.C. Cir. 1966).

In *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 110 (1973), the Court described the congressional approach to regulation of private broadcasters under the Communications Act of 1934:

> From these provisions it seems clear that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only when the interests of the public are found to outweigh the private journalistic

interests of the broadcasters will government power be asserted withn the framework of the Act.

Traditional broadcasting has involved a balancing of the first amendment rights of private broadcasters with what is determined to constitute the public interest. Thus, in *Red Lion Broadcasting*, 395 U.S. at 377, the Court upheld the fairness doctrine which requires that a broadcaster give adequate and fair coverage to public issues, including opposing views. One who has been personally attacked on a broadcast must be offered a personal opportunity to respond, just as a candidate who has not been endorsed must be given reply time. *Id.* On the other hand, broadcasters are not required by the public interest standard or the first amendment to accept paid editorials. *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94 (1973). Although the first amendment rights of the broadcasters are important, the rights of the viewers and listeners are paramount. *C.B.S., Inc. v. F.C.C.*, 453 U.S. 367, 395 (1981).

Another reason advanced for the greater first amendment leeway in regulating broadcasting concerns the pervasiveness of this form of communication. In *F.C.C. v. Pacifica*, 438 U.S. at 748-49, 749 n. 27, Justice Stevens determined that the intrusive nature of broadcasting and its location in the home allows for greater regulation of patently offensive, indecent material than was allowable in *Cohen v. California*, 403 U.S. 15 (1971), where the appellant, in the hall of a public courthouse, wore a jacket with an offensively stated political message on the back. In his concurring opinion in *Pacifica*, Justice Powell also recognized "the interest of unwilling adults in not being assaulted by such offensive speech in their homes." 438 U.S. at 762. In public places, the offended viewer or listener may well need to turn away, but in the sanctuary of the home he may have more control. *F.C.C. v. Pacifica*, 438 U.S. at 749 n. 27; *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970).

Another reason that broadcasting has been subject to greater regulation consistent with the first amendment is its wide availability and accessibility to children. *F.C.C. v. Pacifica*, 438 U.S. at 749-50, 762. Thus, there is no unqualified right to broadcast obscene or indecent material. 18 U.S.C. § 1464. In the case of indecent material, so long as such material remains available to adults, perhaps at a different time or in another medium, the state may restrict the times when such material is broadcast. *F.C.C. v. Pacifica*, 438 U.S. 726, 750 n. 28 (plurality opinion) & 760 (Powell, J. concurring). The rationale behind such a restriction is not to defeat the rights of minors, but to protect them from their own improvidence and the acts of others. *See Ginsberg v. New York*, 390 U.S. at 649-50 (Stewart, J., concurring in result) (first amendment presupposes full capacity for individual choice not yet attained by minors). Such a restriction also enhances a parent's right to minmize a child's exposure to such material, while still retaining the benefits of broadcasting.

The degree of first amendment protection that will be accorded cable television has yet to be determined by the Supreme Court. *City of Los Angeles v. Preferred Communications, Inc.*, 106 S.Ct. 2034 (1986), involved a first amendment challenge to the city's exclusive cable franchising process by auction. The respondent alleged that there was sufficient excess physical capacity to handle additional channels as well as the economic demand for an additional cable system. The Ninth Circuit reversed the district court's dismissal of the first amendment claim, holding that the city could not limit access to a single cable television company by use of an auction process when there was sufficient excess physical and economic capacity to handle another system. *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985). The court of appeals determined that for first amendment purposes cable television was unlike

broadcasting, *see e.g. Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), because there was a lack of physical scarcity of cable channels. 754 F.2d at 1403-04. It also rejected an economic scarcity rationale to justify increased regulation by government relying on *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The Supreme Court affirmed the court of appeals, but on narrower grounds. The Court declined to accept the appellate court's detailed characterization of cable television and its relationship to the first amendment in the absence of greater factual development at the trial court. *City of Los Angeles v. Preferred Communications, Inc.*, 106 S.Ct. at 2036. The Court, however, did make some general observations. Cable television operators plainly engage in first amendment activities not only by producing original programming, but also by exercising editorial discretion over programming. *Id.* at 2037. Just as broadcasters are entitled to first amendment protection, so too are cable operators. *Id.*

> Of course, the conclusion that respondent's factual allegations implicate protected speech does not end the inquiry. "Even protected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. ——, ——, 105 S.Ct. 3439, 3448, 87 L.Ed. 2d 567 (1985) (slip op., at 10). Moreover, where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests. See, *e.g.*, *Members of the City Council v. Taxpayers for Vincent, supra*, 466 U.S., at 805-807, 104 S.Ct. 2129-2130; *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968).

City of Los Angeles v. Preferred Communications, Inc., 106 S.Ct. at 2037-38. Justice Blackmun's concurring opinion leaves little doubt about the importance of an

adequate factual basis for deciding the extent of first amendment protection associated with cable access.

> In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis. As this case arises out of a motion to dismiss, we lack factual information about the nature of cable television. Recognizing these considerations, *ante*, at 5, the Court does not attempt to choose or justify any particular standard.

Id. at 2037 (Blackmun, J. concurring). Several federal courts have considered the issue, discussed below, with differing results.

In *Community Communications Co., Inc. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982), we concluded that cable broadcasting is very different from newspaper publishing where very little government regulation is constitutionally permissible. We declined to apply *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). In *Tornillo*, the Court declared unconstitutional a Florida statute requiring a newspaper to publish a candidate's reply to newspaper criticism and rejected an economic scarcity argument to justify such government regulation of the press. Cable television is distinguishable from a newspaper in that it is extensively regulated and is a natural economic monopoly which depends heavily upon use of the public domain. *Community Communications*, 660 F.2d at 1379. Thus, "government must have some authority in such a context to see to it that optimum use is made of the cable medium in the public interest." *Id.* The degree of authority depends upon the extent to which the cable operation is a natural monopoly, technological development and change, and finally, the uses and possible

uses of the medium. *Id.* Other courts have determined that cable television may be subjected to more regulation than non-broadcast media. *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119, 127-28 (7th Cir. 1982); *Berkshire Cablevision of Rhode Island, Inc. v. Burke*, 571 F.Supp. 976, 983-87 (D.R.I. 1983); *Hopkinsville Cable TV, Inc. v. Pennroyal Cablevision, Inc.* 562 F.Supp. 543, 547 (W.D. Ky. 1982).

Regulations involving the first amendment interests of cable operators and viewers are difficult to justify on a physical scarcity rationale given the tremendous channel capacity of a cable system. *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 44-46 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). Moreover, at least three courts of appeals appear to have rejected the economic scarcity rationale as a justification for more extensive governmental regulation of cable television. *Id.* at 46; *Preferred Communications v. City of Los Angeles*, 754 F.2d 1396, 1405 (9th Cir. 1985); *aff'd on other grounds*, 106 S.Ct. 2034 (1986); *see also Midwest Video Corp. v. F.C.C.*, 571 F. 2d 1025, 1055-56 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979).

The district court resolved the present case on cross motions for summary judgment. It relied on few facts because the statute was challenged as overbroad on its face. 611 F.Supp. at 1107. The destrict court considered the following undisputed facts concerning the nature of cable television service in Utah. I set these out because I think that facts pertaining to the nature of cable television are essential in deciding the degree of permissible content-based regulation.

> 9. A cable television system is a non-broadcast facility consisting of a system of privately-owned coaxial cables and associated signal generation, reception and control equipment that distributes television and other programming to subscribers.

10. Cable television service, such as that provided by [the cable operator plaintiffs], is legally available only on the premises of persons who choose to subscribe to this service and agree to establish and maintain a physical connection between their television receivers and a cable television system.

11. Television receivers that are not physically connected to a cable television system are not capable of receiving programming that is distributed solely over such a system.

12. The primary cable service offered to subscribers of [the cable operator plaintiffs] is called basic cable service. The basic cable service subscription price may include, depending on the particular system, retransmissions of the local television broadcast channels . . ., plus additional television broadcast channels imported by satellite to terrestrial transmissions from distant cities (KWGN-Denver, KTVU-Oakland, KTXL-Sacramento, WTBS-Atlanta, WGN-Chicago, and WOR-New York), plus special just-for-cable channels (ESPN, USA, CNN, SNC, MTV, NN, CBN, CHN, C-Span, and University of Utah ITV).

13. In addition to their basic cable service, [the cable operator plaintiffs] offer to provide programming such as that distributed by HBO (which includes recently released, feature length motion picture films, special entertainment programming and sports events) to those subscribers who choose to subscribe to this programming and to pay a monthly subscription fee in addition to the monthly fee paid for basic cable service.

14. HBO Service and pay television program services offered by companies other than HBO, including such services as Showtime, the Movie Channel and the Disney Channel, are provided by [the

cable operator plaintiffs] and other cable system operators.

15. Each pay television program service offered by [the cable operator plaintiffs] and other cable system operators is offered over a separate channel, and cable subscribers may choose to receive any or all of these program services.

16. [The cable operator plaintiffs] presently have about 60,000 subscribers in Utah.

17. Cable subscribers may obtain, either at no cost or at a cost not to exceed $20.00, a "lockbox" which is key operated and attaches to the television set. These lockboxes enable subscribers to render their sets incapable of receiving any particular channel.

Such devices, while available, are not widely utilized by subscribers.

Record vol. III at 384-86. Although this provides some information on the nature of cable television, the defendants suggested other relevant characteristics. However, the district court correctly determined that such information was not presented in accordance with Fed. R. Civ. P. 56 which requires that material supporting a motion for summary judgment be admissible evidence. 611 F. Supp. at 1107.

The defendants attempted to establish the following: (1) out of 84 million television households, 34 million now subscribe to cable with recent annual growth of 5 million households per year, (2) the cable systems operated by the plaintiffs are de facto monopolies because after each cable operator was granted its franchise, no second cable operator sought a competing cable franchise,[7] (3) that

[7] The district court rejected an economic scarcity rationale as a matter of law as a justification for content-based regulation like that applicable to broadcasting. 611 F.Supp. at 1112-1113. The

the cable operator plaintiffs use or cross public property in laying their cables and are subject to various local requirements, and (5) that less than one percent of the cable subscribers have purchased lockboxes. Record vol. III at 448-449 (¶¶ 25, 27 & 28). The plaintiffs objected to the relevance and materiality of all these contentions, although they did not object to the historical subscription information when considered as an approximation. Record vol. IV at 600-601. Plaintiffs also did not agree that cable systems are de facto monopolies. *Id* at 601.

The district court also did not consider information concerning the scanning practices of cable viewers, programming control exercisable by cable operators and the extent that movies shown on cable are rated. Record vol. III at 449-450. Again, such information did not meet the requirements of Fed. R. Civ. P. 56. The legal determination about the first amendment status of cable television depends somewhat upon an evidentiary basis. But even though the characteristics of cable television were not developed with great specificity at the district court, it seems that the extent of permissible regulation turns on a comparison of the cable medium with other media, particularly broadcasting.

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district court did not cite *Community Communications*, 660 F.2d 1370 (10th Cir. 1981) in its discussion, but rather relied on *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 44-45 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977), which takes a different approach than the Tenth Circuit case. The district court concluded that because there was a lack of physical scarcity, market forces will determine available programming and licensing authorities need not regulate the content of the channels in the public interest provided the programming is protected by the Constitution. 611 F.Supp. at 1113. This says nothing about any economic barriers to entry which might call for regulation. Of course, whether indecent programming is entitled to unlimited constitutional protection still must be determined and that is the context in which the economic scarcity issue is relevant. Whether cable television in Utah constitutes a de facto monopoly was controverted by the parties.

Indecent broadcasting has been regulated. 18 U.S.C. § 1464. The extent of that regulation is better understood with reference to *F.C.C. v. Pacifica*, 438 U.S. 726, which, despite criticism, *see e.g.*, L. Tribe American Constitutional Law 61-68 (1979 Supp.), remains the leading Supreme Court precedent on the subject. In *Pacifica*, the Supreme Court considered whether the F.C.C. could regulate an indecent broadcast consistent with the first amendment. The F.C.C. had issued a declaratory order in response to a complaint against a New York radio station based on the broadcast of a monologue by comedian George Carlin entitled "Filthy Words." The monologue was broadcast about 2:00 p.m. on a Tuesday afternoon. Before the recorded monologue was broadcast, the host of the program warned that it included sensitive language that might offend some listeners, advising them to change stations and return in 15 minutes. *Pacifica Foundation*, 56 F.C.C.2d at 95-96.

A man accompanied by his young son heard the broadcast while driving and complained to the F.C.C. In its Memorandum Opinion and Order, the F.C.C. acknowledged that it is precluded from censorship, 47 U.S.C. § 326, but it and the Justice Department are required to enforce 18 U.S.C. § 1464 which prohibits broadcasing of "any obscene, indecent, or profane language." *Pacifica Foundation*, 56 F.C.C.2d at 96 ¶ 7. The F.C.C.'s declaratory order was not intended to interfere with the wide discretion of broadcasters in the programming area. *Id. citing Pacifica Foundation*, 36 F.C.C. 147 (1964) (provocative programming offensive to some listeners might be scheduled for late evening hours when number of children in audience minimized). The F.C.C. was of the view that indecency, as used in 18 U.S.C. § 1464, was not subsumed by the concept of obscenity, a view which necessarily prevailed at the Supreme Court. *Pacifica Foundation*, 56 F.C.C.2d at 97 ¶ 10; 438 U.S. at 744. Rather than totally restricting indecency, the F.C.C. analogized

to nuisance law in suggesting that it could be channeled into appropriate time periods. *Pacific Foundation*, 56 F.C.C.2d at 98 ¶ 11. The F.C.C. was concerned with the constitutional implications of even a limited restriction:

> In order to avoid the error of overbreadth, it is important to make it explicit whom we are protecting from what. As previously indicated, the most troublesome part of this problem has to do with the exposure of children to language which most parents regard as inappropriate for them to hear. This parental interest has "a high place in our society." See *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972), and cases cited therein. Therefore, the concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of day when there is a reasonable risk that children may be in the audience. (Footnote omitted.) Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe that such words are indecent within the meaning of the statute and have no place on radio when children are in the audience.

Id. Indecency differs from obscenity in that indecency need not appeal to the prurient interest and, when the number of children in the audience has not been reduced to a minimum, it is not protected by a claim that it has literary, artistic, political or scientific value. *See id.* The F.C.C. recognized that during the late evening hours, when the number of children in the audience was minimized, its definition of indecency would remain the same, though such material might be protected if it were shown to have serious literary, artistic, political or scientific value. *Pacifica Foundation*, 56 F.C.C. at 98 ¶ 12.

Without question, the focus of the Supreme Court's review concerned the F.C.C.'s determination that the Carlin monologue was indecent as broadcast. *F.C.C. v. Pacifica*, 438 U.S. at 735. However, in reviewing that determination, it was essential for the Court to determine that the broadcast of indecent material could be restricted in appropriate circumstances consistent with the first amendment. *See id.* at 744, 745 n. 20 (plurality opinion) & 761 (Powell, J., concurring). This necessarily involved considering the degree of first amendment protection accorded material disseminated by broadcasting.

The F.C.C. gave four reasons for treating broadcasting differently for first amendment purposes than other types of expression which are less intrusive:

> (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest.

Pacifica Foundation, 56 F.C.C.2d at 97 ¶ 11, *quoted in*, *F.C.C. v. Pacifica*, 438 U.S. at 731 n. 2. The Court, in discussing why indecent broadcasting was subject to special treatment under the first amendment, emphasized the pervasive presence that the broadcast media have established in the lives of Americans and the unique accessibility of broadcasting to children. 438 U.S. 748-49. This rationale would seem equally applicable to cable television for several reasons, yet the district court declined to apply the *Pacifica* rationale based on what it perceived as the legal insignificance of the decision, 611 F.Supp. 1109-12, and the factual differences between broadcasting and

cable, *id.* at 1113-15. In my view, *Pacifica* is relevant to the regulation of indecency on cable television, but the Utah Cable Decency Act is not a valid time, place and manner restraint on indecency even under *Pacifica.*

There are several reasons which support the notion that cable television is similar to broadcasting for regulation of programming content consistent with the first amendment. Even though cable television is transmitted by cable and regular television is transmitted by broadcasting, there is an undeniable similarity between the two. Both rely on television receivers and provide a similar, and often interchangeable, product. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1986) (under Communications Act, F.C.C. had jurisdiction over cable television, an "impartant aspect of television service."); *United States v. Midwest Video Corp.*, 406 U.S. 649, 665 (1972). In *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 708-109, the Court determined that, like broadcast systems, cable systems could not be regulated as common carriers. To permit the regulation of indecency in radio and television broadcasting, but not on cablecasting, based merely on the differences in transmission, is to deemphasize that the programming transmitted on both emanates from outside the home and is received identically.

Just as radio and television are pervasive, so too is cable television with over 34 million, or approximately 40 percent of television households subscribing. Moreover, if past trends continue, the number of subscribers can be expected to increase. The pervasiveness of television simply is not related to how the signal reaches the set. Pervasiveness is related to the location of the television set in the home, the scanning activity of viewers, and other qualities of the television medium.

Much has been made of the fact that a television household must elect to have cable installed and then pay a

monthly fee for its use.[8] This distinction between traditional broadcasting and cablecasting, more than any other, has lead many including the district court to conclude that cable television "is not an intruder but an invitee whose invitation can be carefully circumscribed." 611 F.Supp. at 1113. Merely because cable television is a subscriber medium does not mean that it is so unlike traditional broadcasting that indecency cannot be regulated. It is helpful to review those elements that distinguish traditional broadcasting from other media when determining whether cable television is pervasive. In *WUHY-FM*, the F.C.C. said:

> *And here it is crucial to bear in mind the difference between radio and other media.* Unlike a book which requires the deliberate act of purchasing and reading (or a motion picture where admission to a public exhibition must be actively sought), broadcasting is disseminated generally to the public . . . under circumstances where reception requires no activity of this nature. Thus, it comes directly into the home and frequently without any advance warning of its content. Millions daily turn the dial from station to station. While particular stations or programs are oriented to specific audiences, the fact is by its very nature, thousands of others not within the "intended" audience may also see or hear portions of the broadcast. (Footnote omitted.) Further, in that audience are very large numbers of children. (Footnote omitted.)

24 F.C.C.2d 408, 411 (1970). When further analyzed, it is apparent that merely subscribing to cable does not alter its basic nature. A subscription to cable presumably

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[8] Although broadcast television is not a subscriber medium, a decision to obtain a television set is a prerequisite to viewing. Moreover, broadcast television is supported, at least indirectly, by viewers who purchase the products advertised.

is purchased to enhance the viewers' choice of programs. It is easy to get a general idea of the contents of a book or magazine, but with television it may be more difficult because of the tremendous diversity of programming, the large number of programs and the scanning which occurs. This is particularly true when indecent programming is interspersed with programming generally thought suitable for minors.

Practically, cable television reception does not require activity of a purchasing nature for each program. The cable viewer is not purchasing a particular program at the time of viewing, but rather he is purchasing a wider range of programs than available on broadcast television. He is purchasing program choice. Cable programs are then disseminated generally to the public, and like programs on conventional television or radio, are frequently viewed or heard in the home where the right to be free of "patently offensive indecent material" outweighs an unlimited right to present such material. *F.C.C. v. Pacifica*, 438 U.S. at 748.

Not only does cable television come directly into the home, it frequently is viewed without any effective advance warning of patently offensive, indecent material. This is true for several reasons. Out of the hundreds of programs offered on cable television, it is unreasonable to shift an affirmative duty onto every parent to study all cable television program listings each week, even assuming that such listings provide adequate warning. No such duty was even considered by the Court in *Pacifica*. While it is true that lockboxes may be used to prevent reception of entire channels, the unwanted complexity that these devices introduce into television viewing is attested to by their lack of use. Most importantly, there is no reason to believe that frequent scanning, often a factor in the regulation of broadcasting, does not occur with cablecasting. This means that viewing often will be unplanned and incomplete. Viewers will tune into scenes

of programs in progress, reducing the effectiveness of warnings preceding such programs. *See id.*

Over and over the argument has been made that a subscriber voluntarily chooses cable television service and should not be heard to complain if some of the programming is indecent because the service may be canceled. Stated another way, the subscriber consents to the indecency for himself and his household. This argument is too simplistic and is akin to the notion that one who hears an indecent broadcast has an adequate remedy by turning it off. This notion was expressly rejected in *F.C.C. v. Pacifica*, 438 U.S. at 748-49. The record indicates that the basic cable service and the optional services provide plenty of programming without patently offensive indecent material. As a developing medium, cable television provides a remarkable opportunity for viewing programming in other distant cities, recent movies, sports and other features for a nominal fee. That opportunity should be available to all who are willing to subscribe, even those who object to patently offensive indecent material being presented during family viewing hours. Quite simply, in enacting the Cable Decency Act, the Utah legislature seems to have wanted to take the good (increased choice) without the bad (indecent material) .

The intent statement of the Cable Decency Act indicates that the Utah legislature was concerned that children have access to cable television and their viewing is largely unsupervised. As discussed previously, the state may restrict access to sexually oriented material which is not obscene provided there is not an outright ban. This is to protect both the state's interest in the well-being of children, *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944), and the right of parents to direct the upbringing of their children, *Ginsberg v. New York*, 390 U.S. 629, 639 (1978). Admittedly, some parents may have no objection to their children viewing what by contemporary community standards is patently offensive and indecent.

That alone does not preclude the state from channeling the indecency to a later time period. It does not matter that some children still may have access to indecent programming when fewer children are in the audience, for an appropriate regulatory act may protect many households. *Pacifica Foundation v. F.C.C.*, 556 F.2d at 34 (D.C. Cir. 1977) (Leventhal, J., dissenting).

Thus, I find that the *Pacifica* rationale for the regulation of indecency applies to cablecasting. *Contra Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985). Although it has been suggested that *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983), limits *Pacifica*, that interpretation is unpersuasive. In *Bolger*, the Court held that a federal statute totally banning the mailing of unsolicited advertisements for contraceptives was contrary to the first amendment. The government sought to justify the total prohibition based on the interests furthered by the statute: protecting recipients from offensive material and protecting the right of parents to guide their children concerning contraception. The Court determined that the former was entitled to little weight and that the latter was furthered too minimally to justify a total prohibition. *Bolger*, 463 U.S. at 73. The Court was satisfied that parents exercise substantial control over the distribution of mail received at home and that the restrictions on this type of mail allowed parents to control and eliminate its receipt. *Id.* at 64 n. 5 & 73.

The Court discussed *Pacifica* indicating it was a narrow holding which applied to broadcasting based on the unique pervasiveness of broadcasting and its unique accessibility to children. *Id.* at 74. Because I find that these same two characteristics are inherent in cablecasting, I cannot read *Bolger* as limiting *Pacifica*'s application to this case. Moreover, *Bolger* is factually distinguishable. The receipt and distribution of printed advertising concerning contraceptives is easily and effectively controlled by parents. The reception of cable television is not.

It must be remembered, however, that *Pacifica* principally concerns the regulation of indecency as applied to a specific factual context. In *Pacifica*, Justice Stevens remarked that "indecency is largely a function of context—it cannot be adequately judged in the abstract." 438 U.S. at 742; *see also id.* at 750. Nonetheless, the case before the court involves a challenge to the Utah Cable Decency Act on its face. Invalidation of legislative enactments without the benefit of facts concerning application is "manifestly, strong medicine" which "has been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). The purpose of such invalidation is to protect the exercise and potential exercise of constitutionally protected expression. "[T]he overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. Stated another way, the statute must reach "a substantial number of impermissible applications." *New York v. Ferber*, 458 U.S. 747, 771 (1982).

Even if *Pacifica* is read to allow regulation of indecency on cable television, the Utah Cable Decency Act is not acceptable because it is complete prohibition rather than regulation. In other words, indecency may be regulated with an acceptable time, place and manner regulation. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Although the Utah legislature has identified a substantial governmental interest in the protection of minors, it has not provided for reasonable alternative times for the dissemination of indecent material. A thoughful opinion by the Utah Attorney General makes a pervasive case that the legislature did not intend a total ban on indecency. The statute does not adequately reflect that intention, however, and a federal court cannot rewrite the statute. *See* Utah Op. Att'y Gen. No. 83-001.

The statute is also void for vagueness. Defining indecency with express reference to "the time, place, man-

ner and context in which the material is presented," Utah Code Ann. § 76-10-1702(4), without more, would cause people of common intelligence to guess at the meaning of indecency and differ as to the law's application. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). This uncertain meaning does not provide fair notice of what is proscribed, could result in arbitrary enforcement and could deter protected expression. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). For these reasons, I am compelled to agree with the result reached by the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
D. UTAH, C.D.

Nos. C 83-0551A, C 83-0581A

COMMUNITY TELEVISION OF UTAH, INC., COMMUNITY CABLE OF UTAH, INC., UTAH SATELLITE, INC., WASATCH COMMUNITY T.V., INC.,

and

CONNIE R. JONES, LYNN F. JONES, CAROLINE A. SNOW, RALPH MCCLEARY, KAY ULRICH, ED ULRICH, WAYNE WILLIAMS, as individuals and as representatives of a class of persons similarly situated,

and

HOME BOX OFFICE, INC.,

Plaintiffs,

v.

HON. DAVID L. WILKINSON, Attorney General of the State of Utah, individually and in his official capacity and as a representative of the class of all persons empowered to enforce the Cable Television Programming Decency Act,

Defendants.

April 10, 1985

Bryan L. McDougal, Robert D. Sherlock, Patricia A. Rorke, and Steven H. Blum, Salt Lake City, Utah, for plaintiffs.

Donald B. Holbrook and LeGrand R. Curtis, Salt Lake City, Utah, and George H. Shapiro and James P. Mercurio, Washington, D.C., for plaintiff-intervenor Home Box Office, Inc.

Robert N. Parrish, Asst. Atty. Gen., State of Utah, Salt Lake City, Utah, and Charles A. Hobbs and Jerry R. Goldstein, Washington, D.C., for defendants.

The court accepted amicus briefs from Morality in Media, Inc., the Nat. Cable Television Ass'n, Inc., the F.C.C. and Citizens for Positive Community Values.

ALDON J. ANDERSON, Senior District Judge.

INTRODUCTION

On April 20, 1983, the Utah State Legislature passed the Cable Television Programming Decency Act ("Cable Decency Act"). Utah Code Ann. §§ 76-10-1701 to -1708 (Supp.1983). The Act gives certain state officials authority to bring nuisance actions against anyone who continuously and "knowingly distributes indecent material within this state over any cable television system or pay-for-viewing television programming." *Id.* § 76-10-1703. The Act defines "indecent material" as follows:

> a visual or verbal depiction, display, representation, dissemination, or verbal description of:
>
> (a) A human sexual or excretory organ or function; or
>
> (b) A state of undress so as to expose the human male or female genitals, pubic area, or buttocks, with less than a fully opaque covering, or showing of the female breast with less than a fully opaque covering of any portion below the top of the nipple; or
>
> (c) An ultimate sexual act, normal or perverted, actual or simulated; or
>
> (d) Masturbation
>
> which the average person applying contemporary community standards for cable television or pay-for-viewing television programming would find is presented in a patently offensive way for the time, place,

manner and context in which the material is presented.

Id. § 76-10-1702(4).

On April 21, 1983, the plaintiffs Community Television of Utah, Inc., Community Cable of Utah, Inc., Utah Satellite, Inc., and Wasatch Community TV, Inc. filed this action. Claiming that the Act infringes upon their first amendment rights, these cable operator plaintiffs sought declaratory and injunctive relief. They named Attorney General David L. Wilkinson as defendant in his individual and official capacities and as a representative of the class of state officials empowered to enforce the Act. Because the plaintiffs raised important constitutional issues, the Attorney General agreed not to enforce the Act pending resolution of this case.

The court consolidated the original action with a separate action brought by several cable TV subscribers and allowed Home Box Office, Inc. to intervene as a plaintiff. The court also accepted *amicus* briefs from Morality in Media, Inc. and the National Cable Television Association, Inc. All plaintiffs moved jointly for summary judgment. The defendants opposed the plaintiffs' motion and filed a cross motion for summary judgment. The court heard oral argument on May 25, 1984 and took both motions under advisement.

As this court prepared to rule on the summary judgment motions, the United States Supreme Court handed down its decision in *Capital Cities Cable, Inc. v. Crisp*, —— U.S. ——, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984). That case involved the scope of the states' power to regulate cable TV. The parties were asked to submit briefs explaining how *Capital Cities* might affect the decision in this case. The court accepted *amicus* briefs on the same issue from the Federal Communications Commission, Morality in Media, Inc. and Citizens for Positive Community Values. On August 10, 1984, the court heard

oral argument on the issues of federal pre-emption raised by the *Capital Cities* case.

After carefully considering both the pre-emption and first amendment issues, the court prepared to rule on the motions. In October 1984, Congress passed the Cable Communications Policy Act ("Policy Act"), a statute which changed the regulatory structure of the cable television industry. The court requested both sides to submit briefs explaining how the new law would affect the pre-emption issue. On November 13, 1984, the parties completed this briefing. Being fully advised, the court now enters this Memorandum and Order for Summary Judgment.

I. FEDERAL PRE-EMPTION

A. *The Capital Cities Case*

In *Capital Cities Cable, Inc. v. Crisp*, the U.S. Supreme Court considered whether Oklahoma could prevent cable television operators from retransmitting alcoholic beverage advertisements originally transmitted from other states. In a unanimous opinion the Supreme Court held that federal law pre-empted the Oklahoma ban. The Court found that the FCC had expressly pre-empted state regulation of the "operational aspects" of cable television. The FCC's exclusive power included authority to regulate the selection of signals cable operators may carry. In turn, the FCC gave state and local authorities responsibility to regulate various local incidents of cable operations. This local power included authority to grant franchises, delineate franchise areas, regulate the construction of cable facilities and maintain rights of way. 104 S.Ct. at 2702.

To support its conclusion, the Court invoked that branch of the pre-emption doctrine that rests on congressional intent. Pre-emption is effective "when Congress, in enacting a federal statute, has expressed a clear intent to pre-empt state law." *Id.* at 2700 (*citing Jones v. Rath*

Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977)). The Court noted that federal regulations pre-empt state law as effectively as federal statutes if the agency decision to pre-empt " 'represents a reasonable accommodation of conflicting policies' that are within the agency's domain." 104 S.Ct. at 2701 (quoting *United States v. Shimer*, 367 U.S. 374, 383, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961)). The Court found that the agency's intent was clear: "[o]ver the past twenty years, pursuant to its delegated authority under the Communications Act, the FCC has unambiguously expressed its intent to pre-empt any state or local regulation of [the] entire array of signals carried by cable television systems." 104 S.Ct. at 2701. This intent to pre-empt extended to power over both non-broadcast signals (commonly described as "pay cable") and retransmitted broadcast signals. *Id.* at 2702.

The Court also explained the reasoning supporting the Commission's pre-emption decision. The Commission values diverse programming, and it has tried to give households access to television services presently unavailable from local broadcasts. State and local regulation of program offerings would interfere with this federal regulatory scheme:

> Consistent with its congressionally defined charter to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide and world-wide wire and radio communication service . . . ," 47 U.S.C. § 151, the FCC has sought to ensure that "the benefits of cable communications become a reality on a nationwide basis." *Report and Order*, 54 F.C.C.2d, at 856. With that end in mind, the Commission has determined that only federal pre-emption of state and local regulation can assure cable systems the breathing space necessary to expand vigorously and provide a diverse range of program offerings to potential cable subscribers in all

> parts of the country. While that judgment may not enjoy universal support, it plainly represents a reasonable accommodation of the competing policies committed to the FCC's care and we see no reason to disturb the agency's judgment. And, as we have repeatedly explained, when federal officials determine, as the FCC has here, that restrictive regulation of a particular area is not in the public interest, "States are not permitted to use their police power to enact such a regulation." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 [98 S.Ct. 988, 1004, 55 L.Ed.2d 179] (1978); [other citations omitted].

Id. at 2705.

In *Capital Cities*, the Supreme Court did not explicitly consider whether state indecency regulations were pre-empted; the Court discussed program regulation in general. In their original pre-emption briefs, the plaintiffs relied on the Supreme Court's sweeping language and concluded that the FCC had pre-empted state indecency regulations. The defendants disagreed, arguing that indecency is a special area appropriately reserved for state regulation.

When Congress passed the new Policy Act, this question of FCC intent became moot. Before Congress enacted this statute, the courts had to rely upon FCC pronouncements to determine the scope of pre-emption. Better authority is now available. In the Policy Act, Congress precisely delineated the spheres of state and federal authority over cable television programming. Courts can now refer to congressional directives to determine whether state laws are pre-empted. The court therefore turns to the Policy Act to resolve the pre-emption issue.

B. *The Cable Communications Policy Act of 1984*

The Cable Communications Policy Act of 1984 is the first federal statute to establish a comprehensive regu-

latory scheme for the cable industry. The provisions of the Policy Act relevant to this case concern the allocation of federal, state and local regulatory power. In the Policy Act, Congress refined the general presumption, announced in *Capital Cities*, that states have no power to regulate program content. In the section of the Policy Act entitled "Coordination of Federal, State and Local Authority" it states that any state or local act or regulation which is inconsistent with the provisions of the Policy Act is pre-empted and superseded. Cable Communications Policy Act § 636(c). The Policy Act retains exclusive federal regulatory power over program content in all but a few limited areas. The Act describes these areas explicitly:

> Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title.

Id. § 624(f)(1).

To resolve the pre-emption issue, the court must determine whether the Policy Act "expressly provided" for the type of regulation enacted by the Utah Legislature.

1. *State Power to Regulate Programs Carried on "Special Access" Channels*

The Policy Act insures that certain parties unaffiliated with the cable operator will have access to the cable television medium. Under the terms of the Policy Act, cable operators must set aside a limited number of channels for independent commercial, public, educational or governmental programs. The Policy Act expressly delineates the scope of state power to regulate program content on these "special access" channels. To begin its pre-emption analysis, the court turns to the question whether the Policy Act permits regulation of these special channels through the mechanism provided in the Utah law.

Section 612 of the Policy Act establishes commercial access channels. It requires that cable operators designate a certain number of channels for commercial use by persons unaffiliated with the operator. *Id.* § 612(b). These special channels are set aside to insure that cable systems carry information from a wide variety of sources. *Id.* 612(a). To enhance the variety of programs available to the public, § 612 prohibits cable operators from editing programs carried on these channels. *Id.* § 612(c)(2).

Section 612(h) does allow state franchising authorities, in determining whether a cable service shall be provided, to consider these factors:

> Any cable service offered pursuant to this section shall not be provided, or shall be provided subject to conditions, if such cable service in the judgment of the franchising authority is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy or indecent or is otherwise unprotected by the Constitution of the United States.

Id. § 612(h).

Assuming *arguendo* that § 612(h) is constitutionally valid, it does not authorize the restrictions in the Utah Decency Act. The power preserved by § 612(h) is too limited for two reasons. First, § 612 only applies to a limited number of commercial channels which have special editorial restrictions. Utah's Cable Decency Act covers significant areas of cable program distribution outside the scope of § 612. Utah Code Ann. § 76-10-1702(2) (Supp.1983).

Second, the Policy Act disallows the type of regulation provided in the Utah law. Because cable operators cannot edit the programs carried on the special channels discussed above, the Policy Act forbids civil actions against the cable operators concerning the content of those programs. *See* Policy Act § 638. Section 612(h) of the Policy Act authorizes a different form of regulation. It provides

that, as to any commercial channels provided under this section, a cable service shall not be provided, or shall be provided subject to conditions, if the cable service in the judgment of the franchising authority is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the United States Constitution. Section 612 therefore expressly pre-empts, rather than authorizes, the Utah law with regard to these channels.

A similar analysis applies to the special public, educational or governmental channels discussed under § 611 of the Policy Act. Under § 611, franchising authorities may require operators to designate a certain number of channels for public, educational or governmental use. *Id.* § 611 (b). Cable operators may not edit the programs carried on these channels. *Id.* § 611(b). Like the special commercial channels discussed above, these channels enhance the variety of information received by the public. The regulatory scheme governing these channels parallels the scheme under § 612. The Policy Act forbids civil actions against cable operators concerning the content of programs on these channels. *See Id.* § 638. State authorities may regulate program content only through the franchise renewal process. *See Id.* § 624(d)(1). The Policy Act therefore expressly pre-empts the Utah law with regard to the channels designated under § 611.

2. *State Power to Regulate Programs Carried on All Other Channels*

Section 638 of the Policy Act delineates the scope of state power to regulate programs carried on all other channels. It is therefore the last section of the Policy Act that might arguably authorize the enforcement of the Utah law. Section 638 preserves certain federal, state and local government powers to regulate the content of cable television programs:

> Nothing in this title shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use [under § 611] or on any other channel obtained under section 612 or under similar arrangements.

Id. § 638.

Hense, § 638 explicitly preserves state power to regulate obscenity. As both sides of this case agree, Utah's Cable Decency Act extends beyond "obscene" materials to regulate those termed "indecent." "Indecency" and "obscenity" are legal terms of art which have different definitions and different constitutional implications. *See infra* Part II of this opinion. The obscenity provision of § 638 therefore does not, by its terms, allow enforcement of Utah's Cable Decency Act, which regulates "indecency." The question here is whether the Cable Decency Act is one of the "other similar laws" which § 638 permits states to enact and enforce.

The list in § 638 is a classic collection of laws regulating expression which the Supreme Court has deemed unprotected by the first amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (libel and slander); *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (incitement); *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) (invasion of privacy); *Virginia Pharmacy Board v. Virginia Consumer Counsel*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (false or misleading advertising). The plain purpose of § 638 is to preserve federal, state

and local regulation of unprotected expression in the areas noted.

Upon examination, Utah's Cable Decency Act does not appear to fit within § 638 because "indecent" expression is not wholly unprotected speech. The very distinction between obscenity and indecency rests to a great extent upon the different levels of constitutional protection extended to both classes of expression. Indecency, which has been found subject to limited regulation under extremely limited circumstances, *see* Part II of this opinion, is conspicuously absent from the list of wholly unprotected expression contained in § 638.

Oother sections of the Policy Act address indecency explicitly. These provisions make it evident that § 638 does not cover laws regulating indecency. Section 624(d)(2)(A) requires cable operators to provide lock boxes at the request of subscribers who wish to "restrict the viewing of programming which is obscene or indecent." Policy Act § 624(d)(2)(A). With a lock box a subscriber can control the particular programs viewed on his television set. As the court notes above, § 612(h) addresses indecency in a different context. These explicit indecency provisions strongly imply that Congress deliberately omitted indecency from the list in § 638. It is unlikely that Congress would accidentally omit indecency from § 638, which defines important areas of federal, state and local power, and remember to include indecency in other sections of the Act.

The legislative history of the Policy Act supports the conclusion that § 638 does not cover the Cable Decency Act. According to the House Committee Report, § 638 preserves state power to regulate "speech which may be held by the courts to be unentitled to constitutional protection (as discussed in relation to section 624(d))." H.R.Rep. No. 934, 98th Cong., 2d Sess. 95 (1984), U.S. Code Cong. & Admin.News 1984, pp. 4655, 4732. In

discussing § 624(d), the Report makes a clear distinction between indecency and "unprotected expression." The Report notes that although the Supreme Court has validated limited restrictions on indecency in the broadcast medium, courts have always found indecent expression protected in the cable television medium. Section 638 would only cover indecency if future court rulings held that indecency regulations are constitutionally valid as applied to cable:

> The provision covers not only obscene speech, but other speech which may also be unprotected by the Constitution of the United States (such as "fighting words" and speech which presents a "clear and present danger" to the public order). This provision would also permit changing constitutional interpretations to be incorporated into the standard set forth in 624(d)(1), *should those judicial interpretations at some point in the future deem additional standards, such as indecency, constitutionally valid as applied to cable.*
>
> The Committee notes that the Supreme Court has held with respect to over-the-air that broadcasting speech which is not obscene, but nevertheless is "indecent", may be subject to government-imposed time, place and manner restrictions due to the unique pervasiveness of the over-the-air broadcast medium. *FCC v. Pacifica Foundation*, 438 U.S. 726 [98 S.Ct. 3026, 57 L.Ed.2d 1073] (1978). The Committee does not intend to disturb the applicability of such restrictions with respect to that medium.
>
> The Committee further notes that Federal courts have held when reviewing the facts under particular state statutes that an indecency standard may not be constitutionally applied to cable television. *Community Television of Utah v. Roy City*, 555 F.Supp. 1164 (D.Utah 1982); *Home Box Office Inc. v. Wilkinson*, 531 F.Supp. 987 (D.Utah 1982); *Cruz v. Ferre*, 571 F.Supp. 125 (S.D.Fla.1983).

H.R.Rep. No. 934, 98th Cong., at 69-70, U.S.Code Cong. & Admin.News 1984, pp. 4706-4707 (emphasis added). *See also* Part II of this opinion.

The defendants cite the remarks of Senator Goldwater and Representative Nielson for the proposition that Congress intended § 638 to cover indecency. Senator Goldwater and Representative Nielson disagree with the official House Report, claiming that indecency laws are "other similar laws" covered by § 638. 130 Cong.Rec. S14289 (daily ed. Oct. 11, 1984); affidavit of Howard C. Nielson. It is not certain from the circumstances that these men understood the clear legal distinction between obscenity and indecency when they made these comments. The Senator and the Congressman seem to characterize indecency as unprotected expression by stating that § 638 preserves state power to regulate it. *Id.* Yet as the analysis above indicates, indecency is not unprotected expression under existing precedent.

The court also notes that Senator Goldwater's comments were inserted in the Congressional Record rather than spoken in the Senate. *See* 130 Cong.Rec. S14289 (daily ed. Oct. 11, 1984); 124 Cong.Rec. 3676 (1978) (all unspoken prepared statements submitted for printing in the Record are preceded by a "bullet" symbol). In addition, some of Representative Nielson's remarks concerned a bill which Congress never enacted. *See* 130 Cong.Rec. H9342 (daily ed. Sept. 11, 1984). Other remarks concerned the final bill but missed being officially transcribed. *See* affidavit of Howard C. Nielson. Under the circumstances, and in view of the clear statutory pattern, the official House Report is a more reliable indicator of congressional intent than the sincere and thoughtful comments of these respected congressmen. Taken as a whole, the legislative history shows that § 638 does not preserve state power to regulate indecency.

In summary, the Policy Act links power with principle. The Policy Act preserves state power to regulate program

content that the first amendment does not protect. If state regulations are unconstitutional, they are also pre-empted under the terms of the Policy Act. The final resolution of the pre-emption question necessarily requires a ruling on the first amendment issue. The court therefore proceeds to analyze the constitutionality of the Cable Decency Act.

II. FIRST AMENDMENT CONSIDERATIONS

A. *The Overbreadth Doctrine*

The free speech clause of the first amendment to the Constitution of the United States provides "the indispensable condition of nearly every other form of freedom": [1] "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.[2] The United States Supreme Court has the responsibility of defining the scope of this clause. Therefore, this court must be guided by Supreme Court precedent in resolving the issues presented.

The plaintiffs allege that Utah's Cable Decency Act violates the first amendment. They challenge the Cable Decency Act on its face, claiming that it is overbroad. In a democratic society which relies upon elected officials for most policy decision, it is "strong medicine" for a court to invalidate a statute on its face. *See Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (973). It is therefore important for the court to explain the general circumstances under which facial invalidation for overbreadth is appropriate.

A law is overbroad "if it 'does not aim specifically at evils within the allowable area of (government) control,

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[1] *Palko v. Connecticut*, 302 U.S. 319, 327, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937).

[2] This prohibition has been extended to the states through the 14th amendment. *De Jonge v. Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 259, 81 L.Ed. 278 (1937).

but . . . sweeps within its ambit other activities that constitute an exercise' of protected expressive or associational rights." L. Tribe, American Constitutional Law § 12-24, at 710 (1978) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 741, 84 L.Ed. 1093 (1940)). An overbroad law is void on its face; it need not be challenged "as applied" to the particular facts of a case. *Id.*

Overbroad laws, for which facial invalidation is appropriate, have two characteristics. First, the overbreadth is substantial; protected activity must be a significant part of the law's "target." *Id.* at 711. The literal scope of many laws encompasses some protected expression. Yet unless the "target area" of these laws contains significant protected expression, they are not overbroad; they can only be challenged "as applied" to particular cases. *Id.*

Second, the unconstitutional applications of an overbroad law cannot be satisfactorily exercised. *Id.* If a court can adopt a limiting construction which will omit unconstitutional applications, the law is not overbroad. In addition, a law is not overbroad if its constitutionally infirm sections may be struck down without "rewriting" it. *Id.* at 714, 717.

Facial invalidation is the appropriate cure for the "chilling effect" created by overbroad laws. By definition, an overbroad law addresses significant protected expression; protected activity is therefore deterred within the law's "target area." This deterrence injures first amendment rights even if a well intentioned prosecutor enforces the law only against unprotected activity. *See* Note, "The First Amendment Overbreadth Doctrine," 83 Harv.L. Rev. 853 (1970).

If Utah's Cable Decency Act is overbroad, facial invalidation is therefore the appropriate remedy. This is true even though it may be difficult for courts to judge

whetre particular materials are indecent without a factual context. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 742, 98 S.Ct. 3026, 3036, 57 L.Ed.2d 1073 (1978). The question whether particular materials are indecent is not before the court in this case.[3] Regardless of the particular applications of the law, the court may strike it down on its face if its "target area" is too broad; a division of this court has already used this remedy twice to invalidate overbroad cable TV laws. *See Box Office, Inc. v. Wilkinson*, 531 F.Supp. 987 (D.Utah 1982); *Community Television of Utah, Inc. v. Roy City*, 555 F.Supp. 1164 (D.Utah 1982).

With the foregoing guidelines in mind, the court must now proceed to determine whether the Utah law is overbroad and void on its face.

B. *The Facts*

Few facts are relevant to a facial challenge, because the law at issue is not analyzed in a factual context. The defendants acknowledged that the only evidence material to a facial challenge concerns the Decency Act itself, its legislative history and the Attorney General's Opinion regarding it. Defendants' Response to Plaintiffs' Motion to Strike at 5 n. 4 (filed Nov. 16, 1983). The plaintiffs agree that the material facts in this case are extremely limited. *See* Memorandum of Plaintiffs in Support of Their Motion to Strike (filed Nov. 7, 1983). From the memoranda presented in this case, the court believes that there is no genuine issue of material fact concerning the

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[3] The defendants urge the court to view numerous examples of the type of material they represent is being broadcast over cable television. This is unneecssary for two reasons. First, the plaintiffs seek a declaratory judgment holding that the law is vague and overbroad. The court's holding obviates any need to determine whether each proffered example is indecent under the statute. Second, defendants have undertaken no enforcement action and therefore it is unnecessary to view examples of what the defendants characterize as indecent.

question whether the Decency Act is facially unconstitutional.

In their amended filings, the parties have presented 37 paragraphs of factual allegations, including objections made. These amended filings effectively superseded prior statements of fact and mooted the motion to strike filed on November 7, 1983.

Some of these pargraphs contain facts that are immaterial to the question of facial validity. Paragraphs 34 through 37 purportedly contain descriptions of excerpts from films shown on HBO or Showtime and opinions regarding the character of the films and the need to prosecute. The state has not yet charged anyone with illegal distribution of any of these particular films; this evidence is immaterial to a facial challenge. Paragraph 24 dicusses the vote on S.B. No. 309 overriding the Governor's veto. This evidence is also immaterial to the constitutional issue before the court. Paragraphs 29 through 33 concern the practice of scanning, HBO contracts, cable operators' ability to delay movie showings, advertising practices and rating methods. These factual allegations lack verification and the showing of competency and personal knowledge required by Rule 56 of the Federal Rules of Civil Procedure. Even if the court were to overlook these procedural deficiencies, this evidence is immaterial to the issue before the court.

The parties disagree about other facts without creating any genuine or material factual issues. Paragraphs 25 through 28 concern cable industry growth, the general manner of cable program distribution, the monopolistic effects of cable systems and the extent of lock box use. The plaintiffs object to the relevance and materiality of these paragraphs but otherwise take only limited exception to the facts. In addition, there is no source provided to support the claims in detail. The court is of the opinion that the degree of difference between the parties is

of no material importance in resolving the issue before the court.

The court has considered the remaining factual allegations, contained in paragraphs 1 through 23, for such assistance as they may provide in understanding and construing the Decency Act. Paragraphs 1 through 18 contain undisputed facts relating to the legislative history of the Act, the Attorney General's advisory opinion interpreting the Act, the parties involved, the claims made and the nature of the cable TV industry. Paragraphs 19 through 23 refer to the legislature's Cable Television Intent Statement, including selected excerpts from individual legislators.

C. *The Miller Test*

The overbreadth doctrine evidences the United States Supreme Court's grave concern for the protection of first amendment rights. In *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), the Court held that obscenity is not protected by the first amendment. However, the difficulty came in articulating precisely what obscenity is. Although some thought that they knew obscenity when they saw it,[4] a comprehensive "definition" of obscenity did not emerge until 1973 in the case of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

In *Miller* the Court noted that "in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities." *Id.* at 22-23, 93 S.Ct. at 2613-2614. The *Miller* Court required that state statutes be "carefully limited" so as not to intrude upon legitimate expression. *Id.* at 23-24, 93 S.Ct. at 2614-2615.

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[4] *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964) (concurring opinion).

Thus, the Court set forth a comprehensive three part test for obscenity:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest [citations omitted]; (b) whether the work depicts or describes, in a pattently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24, 93 S.Ct. at 2615.

In order to be found obscene, the material challenged must meet all three of the prongs of the *Miller* test. Material that does not do so is by definition not obscene and therefore protected from obscenity laws.[5] Utah already has an obscenity statute which comports with the requirements of *Miller*. *See* Utah Code Ann. § 76-10-1201 to -1228 (1978 & Supp.1983); *State v. Piepenburg*, 602 P.2d 702 (Utah 1979); *Piepenburg v. Cutler*, 649 F.2d 783 (10th Cir.1981). Yet the Cable Decency Act is broader. The statute regulates "indecent" material and does not limit itself to material that is legally obscene. It is evident that the Cable Decency Act does not equate indecency with obscenity.

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[5] As the Supreme Court noted in *Miller*, state laws "must be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, *and* which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973) (emphasis added). The *Miller* test is a three part test. *Smith v. United States*, 431 U.S. 291, 299, 97 S.Ct. 1756, 1763, 52 L.Ed.2d 324 (1977). Material is not obscene under *Miller* unless all three parts of the test are satisfied. *United States v. Tupler*, 564 F.2d 1294, 1297 (9th Cir. 1977).

In view of the perspective given by *Miller*, the statute is overbroad for two reasons. First, the law does not address either prong (a) or prong (c) of the *Miller* test. The Decency Act does not require, as prong (a) does, that the material appeal to the "prurient interest." Further, the law does not require that the material, taken as whole, "lack serious literary, artistic, political, or scientific value," which prong (c) demands.

Second, some of the Utah statutory definitions fail to comply adequately with prong (b) of the *Miller* test. To fall within prong (b), material must depict or describe sexual conduct in a patently offensive way. Under the Utah statute material is indecent if it is patently offensive for the time, place, manner and context shown, whether or not the material depicts or describes sexual conduct. Cable Decency Act § 1702(4).

These are results that the *Miller* Court sought to avoid. The *Miller* Court balanced the interest of freedom of expression and the legitimate interest of the state in regulating materials that depict sexual conduct. *Miller*, 413 U.S. at 23-25, 27, 93 S.Ct. at 2614-2615, 2616. But the failure of the legislature to incorporate adequately all three prongs of the *Miller* test means that protected speech may be prohibited. This is because cable TV operators would be subject to civil penalties plus costs and attorney's fees for distributing material that, taken as a whole, does not appeal to the prurient interest. These penalties would also chill distribution of material that may have serious literary, artistic, political, or scientific value. The first amendment seeks to protect these critical and substantial values. The Cable Television Programming Decency Act fails to incorporate these values and is therefore an unconstitutional regulation of cable television.

In addition, the statute's separability clause cannot save it from overbreadth. The Act as a whole fails to satisfy the *Miller* requirements. This Court cannot

rewrite the statute to add in the *Miller* requirements for the legislature. The separability doctrine cannot save a statute which in significant respect fails to incorporate constitutionally mandated protections.

D. *The Scope and Application of FCC v. Pacifica Foundation*

Defendants urge upon the court that *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978), modifies *Miller*'s constitutional mandate. They argue that *Pacifica* expands the legitimate scope of state regulatory powers beyond the limits articulated in *Miller*. Defendants further contend that *Pacifica* established guidelines that the Utah Act follows.

1. *The Application of Pacifica to the Present Case*

Pacifica involved the broadcast of a recorded monologue delivered by the satiric humorist George Carlin before a live audience in California. The monologue, entitled "Filthy Words," contained language that both parties agreed was "indecedent" yet not "obscene" as the Court defined that term in *Miller*. The respondent's radio station broadcast the monologue at 2:00 in the afternoon. A man who heard the broadcast from his car radio while driving with his young son complained to the FCC about the content of the monologue. *Id.* at 730, 98 S.Ct. at 3030.

The FCC considered the man's complaint and issued a declaratory order which provided that the radio station " 'could have been the subject of administrative sanctions.' " *Id.* Although the FCC did not impose formal sanctions, it placed the order in the station's license file for consideration at the time of license renewal. *Id.* The FCC noted that if it received additional complaints the Commission would decide if formal sanctions would be necessary. These potential sanctions included immediate revocation of the station's license, a cease and

desist order, a fine, denial of license renewal or imposition of a short term renewal. *Id.* at n. 1.

In support of its declaratory order, the Commission argued that broadcasting is fundamentally different from other types of communication. Accordingly, broadcasting deserved different treatment from other forms of speech. Four reasons supported this rationale:

> (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, [citation omitted]; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is scarcity of spectrum space, the use of which the government must therefore license in the public interest.

Id. at 731 n. 2, 98 S.Ct. 3031 n. 2.

The respondent Pacifica Foundation challenged the decision of the Commission. In a plurality opinion the United States Supreme Court upheld the FCC.

Defendants assert that the holding in *Pacifica* controls the present case. The court disagrees for the following three reasons. First, *Pacifica* is subject to factual limitations. Second, subsequent authority specifically limits *Pacifica.* Third, fundamental differences between the broadcast medium and cable television require that *Pacifica* not be extended to cable television.

a. *The factual Limitations of Pacifica.*—The holding in *Pacifica* is narrow. The Court merely agreed that the FCC had the statutory authority to take note of past program content when deciding whether to renew a broadcast license. Although the FCC has no statutory power to "censor" broadcasts by excising indecent material before it is broadcast, it may impose sanctions by refusing to renew the license of stations who broad-

cast such material. *Id.* at 735-738, 98 S.Ct. at 3033-3035. The Court itself stressed the factual limitations of its holding:

> It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which *context* is all important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant.

Id. at 750, 98 S.Ct. at 3041 (emphasis added and footnote omitted).

Moreover, the concurring opinion viewed the holding even more narrowly. Justice Powell felt that "the Commission's order was limited to the facts of this case." *Id.* at 761 n. 4, 98 S.Ct. at 3047 n. 4. This view is supported by what the Court allowed. The Court deferred to the FCC and relied on its expertise in regulating station licenses.

Because the factual basis of its holding is very narrow, *Pacifica* does not validate the Decency Act. Stressing that the material at issue was broadcast in the mid afternoon, *see id.* at 750, 98 S.Ct. at 3041, the Court did not approve regulation at all times of day. The Utah statute, under the circumstances stated therein, imposes a fine upon cable operators who distribute material outlawed by the statute at *any* time. The attorney general's

guidelines purport to allow adult material to be presented from midnight to 7:00 a.m. These guidelines do not cure the constitutional infirmity. *See* discussion *infra* at 1114-1115.

Furthermore, the Court only approved a very mild penalty. The FCC did not immediately revoke the station's license, issue a cease and desist order, impose a fine, deny license renewal or impose a short term renewal. The penalty imposed was only a notation of the complaint in the station's license file. This penalty may have had no impact on the station's day to day operation, other than to cause the station to broadcast the monologue in the evening. *Id.* at 760, 98 S.Ct. at 3046 (concurring opinion).

The Utah Act subjects the cable operators to a potential fine of $1,000 for the first offense and escalates to $10,000 for a second offense as well as reasonable costs and attorney's fees for distributing material outlawed by the statute.[6] Although the cause of action is not technically criminal, it does establish an increased penalty for repeated showings and is manifestly intended to deter distribution of indecent material. The Commission's action caused Justice Powell to write: "since the Commission may be expected to proceed cautiously, as it has in the past, [citation omitted] I do not foresee an undue 'chilling' effect on broadcasters' exercise of their rights." *Id.* at 761-62 n. 4, 98 S.Ct. at 3046-47 n. 4. The *Pacifica* Court was closely divided, with four Justices dissenting and two concurring. If the penalty had been greater the result in the case may have been different. *Pacifica* cannot be read to allow all state and local governments to regulate cable content in accord with their respective views of indecency by imposing civil fines.

b. *Subsequent Case Law Limits Pacifica.*—The narrowness of the holding in *Pacifica* is supported by the

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[6] Utah Code Ann. § 76-10-1704 (Supp. 1983).

case of *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983). *Bolger* is the only case since *Pacifica* in which the Supreme Court has authoritatively considered whether *Pacifica* applies to any medium other than broadcast. In *Bolger* the Court struck down a federal statute which prohibited the mailing of unsolicited advertisements for contraceptives. Justice Marshall, who dissented in *Pacifica*, wrote for the Court. He noted that "[o]ur decisions have recognized that the special interest of the federal government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication." *Id.* 103 S.Ct. at 2884. According to the Court in *Bolger*, the ruling in *Pacifica* was justified because broadcasting was uniquely pervasive and " 'accessible to children, even those too young to read.' " *Id.* (quoting *Pacifica* 438 U.S. at 748, 98 S.Ct. at 3040). But the Court felt that the "receipt of mail [was] far less intrusive and uncontrollable" than the broadcast in *Pacifica*. *Id.*[7] The Court refused to extend *Pacifica* to a medium other than broadcast. A reasonable inference may be drawn that the Court desired to limit *Pacifica* to its facts.

In addition, the Court in *Bolger* rejected arguments that are similar to claims that the defendants advance in this case. Defendants assert that some persons will be offended by some programs shown on cable television. Defendants' Amendment Memorandum in Opposition to Plaintiffs' Joint Motion for Summary Judgment at 20 (filed Mar. 22, 1984). Further, the defendants assert that the Utah statute helps parents protect their children from exposure to indecent material. *Id.* at 26.

In *Bolger* the Court considered similar arguments. There the government advanced two justifications for

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[7] The plaintiffs argue that cable television is also less intrusive and more controllable than broadcast. *See infra* Section D. 2 of this opinion.

the ban on the distribution of contraceptive advertising. First, some recipients of the advertising might be offended by it. Second, the statute aided parents' attempts to control the sex education of their children.

In rejecting the first justification, the Court explained that "[r]ecipients of objectionable mailings, however, may " 'effectively avoid further bombardment of their sensibilities simply by averting their eyes." ' [citation omitted] Consequently, the 'short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.' ". *Id.* 103 S.Ct. at 2883. The logic of *Bolger* is inconsistent with defendants' claim that the first amendment allows civil nuisance fines to be imposed upon persons who distribute cable material to adult subscribers.

The Court also rejected the argument that the interest of parents in controlling the sex education of their children was sufficient to overcome the commercial speech rights involved. *Id.* at 2884. Although recognizing that the parental interest was substantial, the Court concluded that the prohibition that protected this interest was too restrictive and interfered with the rights of adults to receive this material. *Id.* Thus, the Court found unsolicited commercial mailings that contained contraceptive advertising protected by the first amendment. By authorizing fines that create a de facto ban of some cable material, the Decency Act imposes a restriction inconsistent with *Bolger* and far "more extensive than the Constitution permits, for the government may not 'reduce the adult population . . . to [seeing] only what is fit for children.' " *Id.* (quoting *Butler v. Michigan*, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed.2d 412 (1957)).

Furthermore, in *Bolger* the Court classified the unsolicited advertisements for contraceptives as commercial speech. *Id.* 103 S.Ct. at 2880-81. Commercial speech is

entitled to less protection than cable broadcasting,[8] yet the Court in *Bolger* rejected the rationales advanced by the defendants in the present case.

c. *The Fundamental Differences Between Cable and Broadcast Media Distinguish Pacifica From the Present Case.—Pacifica* validated limited regulation of indecency in the broadcast medium. The present case concerns regulation of a different medium. This is a significant distinction.

The physical scarcity of broadcast spectrum space justifies governmental regulation of the use of that space. "There is a fixed natural limitation upon the number of stations that can operate without interfering with one another." *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 213, 63 S.Ct. 997, 1008, 87 L.Ed. 1344 (1943). The regulation of the broadcast medium is vital as a "traffic control" device. Licensing is required to avoid interference between stations; without governmental rationing of broadcast frequencies, chaos would result. *See id.*

It has long been established that the FCC's role as a "traffic controller" has included a duty to insure that broadcast licenses are used in the public interest. Broadcast frequencies are scarce public resources; this physical

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[8] Commercial speech is subject to broader regulation than traditionally protected speech. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 2879, 77 L.Ed.2d 469 (1983). And despite the profit inherent in movies, books, magazines and newspapers, the Court has held that they are entitled to the complete panoply of first amendment protections. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02, 72 S.Ct. 777, 780-81, 96 L.Ed. 1098 (1952). Only when the primary purpose of the speech is to sell another product is such speech characterized as commercial. *Valentine v. Chrestensen*, 316 U.S. 52, 55, 62 S.Ct. 920, 921, 86 L.Ed. 1262 (1942). The primary purpose of cable TV is not to sell another product; cable TV is the product, must like movies, books, magazines and newspapers. Thus, cable TV is not commercial speech within the Court's definition.

scarcity justifies allocation according to the public interest. *Pacifica* 438 U.S. at 731 n. 2, 98 S.Ct. at 3031 n. 2. The FCC's duties to protect the public interest justify limited program content regulation in the broadcast medium to insure the best programming for the most people. To promote this interest, the FCC has always had the power to review the content of completed broadcasts in deciding whether to renew licenses. *See id.* at 735, 98 S.Ct. at 3033. The FCC's action in *Pacifica* was an exercise of this power. The limited regulation validated in *Pacifica* is therefore merely an extension of the long tradition of indirect content regulation accomplismment through the license renewal process. *Pacifica* upheld a type of regulation appropriate to the unique characteristics of the broadcast medium.

Because of its special characteristics, broadcasting is the form of communication that has received the most limited first amendment protection. *Id.* at 748, 98 S.Ct. at 3039. In the cable medium, the physical scarcity that justifies content regulation in broadcasting is not present. The Court in *Pacifica* deliberately limited its discussion to the broadcast medium.

Amicus Morality in Media, Inc. argues that *Pacifica* applies to the present case because both broadcast and cable are "scarce media." Seizing on scarcity as the justification for broadcast regulation, *amicus* tries to prove that cable is a scarce only has one cable franchise, it is argued that cable television is "economically" scarce. *Amicus* claims that this "economic" scarcity, like the "physical" scarcity characteristic of the broadcast medium, justifies content regulation.

It is not clear from the record before the court whether the cable medium truly is scarce in the "economic" sense discussed above. Under the new Policy Act, states may allow as many or as few cable franchises as they choose. Policy Act § 621(a)(1). Yet even

if the cable medium is "economically" scarce, this scarcity does not justify content regulation like that in the broadcast medium. *See, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9, 44-45 (D.C.Cir.1977). This is true because cable is not limited to a finite number of channels the way broadcasting is. The demand for cable services determines the number of cable channels. The number of additional channels, in a technical sense, is subject to extensive expansion. *See, e.g., Home Box Office, Inc. v. Wilkinson*, 531 F.Supp. 987, 1002 (D.Utah 1982). As a result, there is no danger of interference between channels. The government therefore need not "control traffic" by rationing channls. As long as the material carried on cable channels is protected by the Constitution, licensing authorities need not police the content of those channels in the public interest, because no physically scarce public resource is involved. The supply and demand of the market place will determine the type of programming that will be successful. The public interest in receiving diverse information, an interest which the market might not adequately respect, is protected by the new Policy Act. The "special access" channels established by the Policy Act guarantee a variety of programs. *See* discussion *supra* Part I of this opinion; Policy Act §§ 612, 611.

2. *The Application of Pacifica's Rationale to the Present Case*

Defendants attempt to show that *Pacifica*'s rationale applies to cable television. The Court's reasoning in *Pacifica* was twofold. First, broadcasting has a pervasive presence which might intrude into the home and violate an individual's right to be left alone. Second, children may easily obtain access to indecent broadcast material, undermining both the "government's interest in the 'well-being of its youth' " and parents' authority over their children. *Id.* 438 U.S. at 748-50, 98 S.Ct. at 3039-41.

a. *Interference with the Right of Privacy.*—Defendants argue that cable television is more pervasive than the FM broadcasting at issue in *Pacifica.* Therefore, defendants claim, indecency on cable television can be regulated through civil sanctions. This analysis oversimplifies the *Pacifica* Court's decision. The Court did not say that pervasiveness by itself establishes a right to regulate protected expression. According to the Court, pervasiveness which *results* in an unwarranted intrusion upon one's right to be left alone justifies regulation of FM broadcasts. That is, the right to be left alone in one's own home outweighs the first amendment rights of those who wish to intrude into that home. *Id.* at 748, 98 S.Ct. at 3039.

The practical and critical distinction between *Pacifica* and the present case is apparent: cable television is not an uninvited intruder. As the FCC observed in its *amicus curiae* brief submitted to this court:

> First, cable is a subscriber medium, generally only available if the person who views it has affirmatively contacted the cable system and asked that a wire be brought into his home and attached to his television set. Without that voluntary act, there is no cable programming. Second, as to certain interstate-transmitted services, particularly as to entertainment channels such as HBO, Showtime, and the Movie Channel, a subscriber must usually pay a premium in addition to its subscriber fee in order to receive service. Otherwise, the signal is scrambled both aurally and visually, precluding reception in the home. Third, a subscriber may, if it so chooses, acquire a "lock box" which prevents reception of any particular cable programming without his authorization. [Fourth], television guides, providing advance notice of the nature of upcoming program offerings, are almost always available.

Memorandum for the Federal Communications Commission as *Amicus Curiae* at 5-6.

The distinction that the FCC and plaintiffs urge is that cable TV is not an intruder but an invitee whose invitation can be carefully circumscribed.[9] *See Pacifica* at 748-49, 98 S.Ct. at 3039-40. Because a subscriber must initiate the service, there is no uninvited intrusion into the privacy interest that the Court articulated in *Pacifica*. The individual who complained about Carlin's monologue never subscribed to radio programs. In addition, the complainant did not pay an additional fee to be able to listen to Carlin's monologue, as a subscriber to HBO, Showtime or the Movie Channel must. No lock box device even existed. In addition, it does not appear that a radio program guide provided any information in advance to warn potential listeners of the content of Carlin's monologue.

b. *The Interests of Children.*—Defendants argue alternatively that the state's interest in protecting children justifies regulation of indecency. In *Pacifica* the Court wrote that the "ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting." *Id.* at 750, 98 S.Ct. at 3041. In *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct 1274, 20 L.Ed.2d 195 (1968), the Court upheld a New York law that prohibited the sale of "harmful" indecent material, not legally obscene, to persons under 17 years of age. The concerns emphasized in *Ginsberg v. New York* consisted of two separate interests that justified a different constitutional standard for minors. First, the state has an interest in the well-being of its youth. Second, parents have an interest in exercising authority over their children.

(1) *The State's Interest in the Well-Being of its Youth.* In *Ginsberg* the governmental and parental interests listed

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[9] The Cable Policy Act requires that all cable operators must offer to their customers "a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber." Policy Act § 624(d)(2)(A).

above gave support to the same conclusion that the law was valid. In contrast, defendants set parental and governmental interests at odds with each other. Defendants allege that "not all parents will exercise [the] necessary degree of control. Many parents may be indifferent to this material or ignorant of its harmful effect." Defendants' Amended Memorandum in Opposition to Plaintiffs' Joint Motion for Summary Judgment at 26 (filed Mar. 22, 1984). In so arguing, defendants make a fundamental departure from *Pacifica*. According to the defendants, since not all parents will do their job in limiting their children's access to indecent material, the state must step in.

In drafting the Decency Act, the legislature addressed the admirable goal of protecting children from deleterious material. In the intent statement of the Decency Act, the legislators wrote that "children have access to cable television and, in many cases, are unsupervised by parents." *Id.* at 2. Thus, the legislators sought to assist parents in their supervisory role.

The language of the statute provides that civil fines apply only to material that "is presented in a patently offensive way for the time, place, manner and context in which the material is presented." Utah Code Ann. § 76-10-1702(4) (Supp.1983). This language, defendants argue, indicates that the legislature intended to prohibit presentation of "indecent" material only during the daytime. Defendants claim that *Pacifica* allows the state to channel indecent material to the early morning hours (12:00 a.m. to 7:00 a.m.) because of the interests of children.

Although protecting children is a very desirable and legitimate goal, the Act itself does not mention children anywhere. It does not provide any systematic procedure for protecting children. Section -1702(4) provides no limiting principle consistent with applicable constitutional standards. Even assuming *arguendo* that *Pacifica* vali-

dates a prohibition limited to the daytime, the statutory language does not channel indecency to specific viewing hours. The legal infirmities of the statute are so great that this court could not so limit the statute even through purposive construction without engaging in improper judicial legislation. Thus, the scope of the language is so uncertain as to chill legitimate expression in a way that the overbreadth doctrine forbids.

Even though the language in section -1702 is constitutionally insufficient, the Attorney General argues that he has promulgated rules which cure any defect. These rules provide for nonenforcement during the "adult viewing hours" (midnight to 7:00 a.m.). The statute does not provide for any such rulemaking authority. In addition, if a subsequent attorney general decides to rescind the guidelines, protected speech will be threatened. This analysis assumes, without deciding, that such guidelines would be sufficient to cure any constitutional infirmity.

Moreover, localities possess an independent right to enforce the Decency Act. *Id.* § 76-10-1704(2). In addition, that statute provides that this "act does not preclude the . . . right of cities, counties, or other political subdivisions from further regulating the distribution of indecent material over any cable television system or pay-for-viewing television programming." *Id.* § 76-10-1707. The Attorney General can neither prevent local government from enforcing the law to its fullest extent nor avert local enactment of other similarly inhibitory laws.

A further fact that must be taken into account is that the Act does not consider the rights of consenting adults under *Miller* to view nonobscene material. In *Pacifica* Justice Powell's concurrence emphasized the importance of protecting the rights of adults while at the same time insulating children from indecency. Justice Powell feared that the *Pacifica* ruling might "have the effect of 'reduc(ing) the adult population . . . to (hearing) only what is fit for children.' [citation omitted] This argu-

ment is not without force." *Pacifica*, 438 U.S. at 760, 98 S.Ct. at 3046. Justice Powell concluded that the holding of the Court "does not prevent respondent Pacifica Foundation from broadcasting the monologue during late evening hours when fewer children are likely to be in the audience." *Id.* at 760, 98 S.Ct. at 3046. Thus, *Pacifica* seems to preserve the right of adults to listen to Carlin's monologue on the radio. Utah's cable television law would prevent adults from exercising their rights in a manner consistent with the rationale of *Pacifica*.

(2) *The Parental Interest in Supervising Children.*— Restrictions in the Utah Act may well be inconsistent with the right of parental control articulated in *Pacifica* and *Ginsberg*. The enforcement of the Act could result in a ban of certain defined materials that may have serious literary, artistic, political or scientific value and that some parents want to show their children. Under Utah's law they could not do so, even though rulings of the Supreme Court allow parents to provide materials for their children that the children themselves cannot purchase: "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." *Ginsberg v. New York*, 390 U.S. at 630, 88 S.Ct. at 1275 (footnote omitted).

Thus, the distinctions between *Pacifica* and the present case are manifest. *Pacifica* does not authorize the regulation attempted by the Utah Legislature. At best *Pacifica* stands for the proposition that a federal regulatory agency can monitor consumer complaints directed at broadcasters who operate in the public domain. The differences between radio and cable made *Pacifica* easily distinguishable and contradict defendants' argument.

3. *The 11th Circuit Case of Cruz v. Ferre Supports This Court's Treatment of Pacifica*

While the court prepared this opinion, the 11th Circuit decided the case of *Cruz v. Ferre*, 755 F.2d 1415

(11th Cir.1985). *Ferre* adds further support to this court's conclusion that *Pacifica* does not control the resolution of the present case. In *Ferre* the 11th Circuit considered the constitutionality of a Miami, Florida ordinance that provided for suspension or termination of the licenses of operators who knowingly distribute indecent material on cable television. The *Ferre* court held that the ordinance was unconstitutionally overbroad because it was not limited to obscenity and applied without regard to the time of day or the ability of parents to control their children's access to unsuitable cable programs. In reaching this result, the court explicitly distinguished *Pacifica*, using an analysis similar to this court's.

The *Ferre* court recognized, as this court has, that cable television "does not 'intrude' into the home," that parents can significantly control their children's access to cable and that the *Bolger* case largely limited *Pacifica* to its facts. *Cruz v. Ferre*, 755 F.2d 1415, 1420-22 (11th Cir.1985). Although the enforcement procedure in *Ferre* was different from the Decency Act's,[10] the *Ferre* court relied on the same factors as this court in determining that *Pacifica* is not useful precedent.

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[10] The Miami enforcement procedure differed from the Decency Act's in two respects. First, violation of the ordinance could mean that an operator's license could be suspended for up to nine days or revoked. *Cruz v. Ferre*, 755 F.2d 1415, 1417 (11th Cir. 1985). The Decency Act provides for fines but does not give power to revoke a license. In theory, under the Decency Act an operator could broadcast indecent material as long as he paid the fines, costs and attorney's fees. As a practical matter, this course of action would probably prove to be too costly to the Utah cable operator. Viewed in this way, the sanctions in the two laws are analogous in effect.

Second, the ordinance in *Ferre* provided that the Miami city manager was to be the prosecutor, fact-finder and judge. *Id.* at 1416-17. The *Ferre* court held this procedure to be a violation of due process. Under the Utah Act, the attorney general or local prosecutor brings the action against an offending operator. An independent fact-finder would determine whether the operator had violated the Act. *See* Utah Code Ann. § 76-10-1704.

E. *The Utah Law as a Time, Place and Manner Restriction*

Defendants argue that the Act, limited by the attorney general's guidelines, operates as a legitimate time, place and manner restriction and can be upheld on that basis. The phrase "time, place, and manner" is a legal term of art. The Supreme Court has sustained such restrictions when they regulate without regard to content, serve a significant governmental interest, and leave open ample alternative channels for communication. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 515-17, 101 S.Ct. 2882, 2896-97, 69 L.Ed.2d 800 (1981).[11]

Although the Decency Act purports to regulate cable material according to "the time, place, and context in which the material is presented," the Act cannot qualify as valid time, place, or manner restriction. This is because the Utah law and the attorney general's guidelines regulate according to content. The statute regulates according to content because it provides that fines will only be imposed when the material distributed violates the specific standards set forth in section -1702. The Attorney General states that "I do not plan to enforce the Act *based on any program containing indecency* which begins after midnight or which ends by seven o'clock in the morning." Cable Television Programming

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[11] The defendants cite *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), for the proposition that there are exceptions to the content neutrality requirement when juvenile audiences are involved. Defendants' Amended Memorandum in Opposition to Plaintiffs' Joint Motion for Summary Judgment at 37-39 (filed Mar. 22, 1984). This argument fails for two reasons. First, no Court majority adopted the proposition. The citation is to the dissenting opinion. *Young* at 85-86, 96 S.Ct. at 2459-2460. The concurring opinion says that the regulation challenged in that case is not a time, place or manner restriction at all. *Id.* at 82 n. 6, 96 S.Ct. at 2458 n. 6. Second, even if an exception for juvenile audiences existed, this opinion demonstrates that the scope of the Utah law extends far beyond the interests of children.

Decency Act of 1983, Op.Att'y Gen. No. 83-001, p. 10 (October 17, 1983) (emphasis added). Thus, the Attorney General distinguishes between permissible and impermissible cable material by reference to its content. *See Metromedia*, 453 U.S. at 516, 101 S.Ct. at 2897. Therefore, the Act cannot be sustained as a valid time, place or manner restriction.

Moreover, constitutional time, place and manner restrictions cannot be so vague as to infringe upon protected speech. The Supreme Court has noted that first amendment freedoms "are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. [citations omitted] Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963).

The Decency Act does not regulate with such "narrow specificity." This is because in determining whether material is indecent under the Act, the fact-finder must consider "the time, place, manner, and context in which the material is presented." Utah Code Ann. § 76-10-1702 (Supp.1983). The Act does not indicate to the fact-finder how a particular time, place, manner, or context should be considered in determining whether or not specific material is indecent. The words "time, place, manner, and context" neither provide the fact-finder with sufficient guidance nor adequately limit the scope of the Act to cure the constitutional infirmities discussed above. In so doing, the Act leaves prosecutors, judges and juries free "to pursue their personal predilections," [12] because the limiting principles contained in *Miller* are not present in the Act.

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[12] *Smith v. Goguen*, 415 U.S. 566, 575, 94 S.Ct. 1242, 1248, 39 L.Ed.2d 605 (1974).

Because the meaning of the words "time, place, manner, and context" is unclear, section -1702 does not provide the cable operators with notice of what material can or cannot be shown. Thus, operators may be deterred from distributing protected material because they are uncertain whether the showing of such material will subject them to the Act's sanctions. The Constitution requires "fair notice or warning," and legislatures must set reasonably clear guidelines for triers of fact. *Smith v. Goguen*, 415 U.S. 566, 572-73, 94 S.Ct. 1242, 1246-47, 39 L.Ed.2d 605 (1974). This statute provides neither fair notice or warning nor reasonably clear guidelines and is therefore void for vagueness.

III. CONCLUSION

Cable television is a powerful form of communication. Used properly, it can edify and inspire as well as entertain. Used improperly, it can seriously damage the quality of life that we have and reduce public tastes to their lowest common denominator. Following Supreme Court precedent, today's ruling delineates an area in which private individuals, particularly parents, must assume an important responsibility for maintaining a decent society. The first amendment puts "the decision as to what views shall be voiced largely into the hands of each of us, in the hope that the use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen v. California*, 403 U.S. 15, 24, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971).

IV. ORDER

Based on the foregoing analysis this court concludes that the Utah Cable Television Programming Decency Act is unconstitutionally overbroad and vague, and void on its face.

As a result of this ruling, the court also necessarily holds, by reason of its analysis in Part I, that the Cable Communications Policy Act pre-empts the Utah Cable Television Programming Decency Act.

IT IS THEREFORE ORDERED that the plaintiffs' motion for summary judgment is granted, and the defendants' motion for summary judgment is denied.

Plaintiffs are directed to prepare a judgment reflecting the court's ruling and permanently enjoining the defendants from enforcing the Cable Television Programming Decency Act.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

C-83-0551A and C-83-0581A
(Consolidated)

COMMUNITY TELEVISION OF UTAH, INC., COMMUNITY CABLE OF UTAH, INC., UTAH SATELLITE, INC., WASATCH COMMUNITY T.V., INC.,

and

CONNIE R. JONES, LYNN F. JONES, CAROLINE A. SNOW, RALPH MCLEARY, KAY ULRICH, ED ULRICH, WAYNE WILLIAMS, as individuals and as representatives of a class of persons similarly situated,

and

HOME BOX OFFICE, INC.,

Plaintiffs,

v.

HON. DAVID L. WILKINSON, Attorney General of the State of Utah, individually and in his official capacity and as a representative of the class of all persons empowered to enforce the Cable Television Programming Decency Act,

Defendants.

[Filed June 28, 1985]

ORDER GRANTING PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES IN JUDGMENT

INTRODUCTION

On April 10, 1985, the court granted summary judgment for the plaintiffs in this case. The court directed the plaintiffs to prepare a judgment reflecting the ruling. On April 29, 1985, the plaintiffs submitted a proposed judgment which included an award of attorneys' fees under 42 U.S.C. § 1988. At the same time, the plaintiffs moved to include an award of attorneys' fees in the judgment. Because an appeal of the April 10 ruling appears likely, the plaintiffs urge only that the judgment should include an entitlement to "reasonable" fees. The plaintiffs acknowledge that final calculation of the fees should await the promised appeal. The question here is whether the court should include an award of reasonable attorneys' fees as part of the judgment.

The parties agree that 42 U.S.C. § 1988 governs the issue before the court. In civil rights cases, § 1988 alters the traditional "American rule" that each party bears its own fees. § 1988 provides that, in a civil rights case, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." It is important to note that case law limits the court's discretion in these matters. Precedent establishes that prevailing plaintiffs should ordinarily recover fees unless "special circumstances" would render such an award unjust. *See Love v. Mayor of Cheyenne*, 620 F.2d 235, 236 (10th Cir. 1980). The court must therefore determine whether "special circumstances" preclude an award of attorneys' fees in the present case.

I. EFFICIENT DISPOSITION OF THE FEE ISSUE

The defendants urge the court to defer ruling on the fee issue. According to the defendants, a ruling on fees should follow the decision in the promised appeal. The defendants claim that it would be inefficient and wasteful for the court to rule now.

The defendants advance no good reasons for the court to defer. The parties have briefed and argued the fee issue, and the court is intimately familiar with the details of the case. The court believes that considerations of efficiency require a ruling at this time. If the defendants appeal the final judgment, the Court of Appeals will have all relevant issues before it at one time.

II. THE INDIVIDUAL PLAINTIFFS

In their opposition memorandum, the defendants distinguish between the plaintiffs who are individuals and the corporate plaintiffs. The defendants concede that the court should award fees to the individual plaintiffs. Because no special circumstances dictate otherwise, the individual plaintiffs are entitled to reasonable attorneys' fees under § 1988.

III. THE CORPORATE PLAINTIFFS

According to the defendants, the court should not award fees to the corporate plaintiffs. The defendants claim that the corporate plaintiffs' ability to pay legal fees is a "special circumstance" which preclude a fee award. According to the defendants, the purpose of § 1988 is to encourage plaintiffs with meager means to vindicate their rights. The corporate plaintiffs have millions of dollars in assets. The defendants maintain that the prospect of a fee award under § 1988 did not affect the corporate plaintiffs' decision to litigate.

The corporate plaintiffs do not deny that their assets are substantial. These plaintiffs merely argue that their ability to pay counsel is not a "special circumstance" precluding a fee award.

The case law supports the plaintiffs' position. The Fifth Circuit has determined that ability to pay does not affect the entitlement to fees. *See International Society for Krishna Consciousness, Inc. v. Collins*, 609 F.2d 151 (5th

Cir. 1980). The Ninth Circuit agrees that it is irrelevant whether an action would have been brought in the absence of § 1988. *Ackerley Communications v. City of Salem, Oregon*, 752 F.2d 1394, 1397 (9th Cir. 1985), *cert. denied*, —— S.Ct. —— (1985).

The defendants rely heavily upon *Zarcone v. Perry*, 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979), the case which announced the "bright prospects" rule. In that case, the court denied an award of attorneys' fees because the "prospects of success" were "sufficiently bright to attract competent private counsel on a contingent fee basis." 581 F.2d at 1044. The "bright prospects" rule depends upon the notion that the purpose of § 1988 is to remove financial barriers to civil rights suits:

> . . . the principal factor to be considered by the trial judge in exercising his discretion is whether a person in the plaintiff's position would have been deterred or inhibited from seeking to enforce civil rights without an assurance that his attorneys' fees would be paid if he were successful.

Id. Zarcone therefore directly supports the defendants' position.

The Tenth Circuit has strongly implied that ability to pay should not affect the entitlement to fees. In 1980, the Tenth Circuit expressly reserved the question whether ability to pay is relevant to the fee determination. *Love v. Mayor of Cheyenne*, 620 F.2d 235, 237 (10th Cir. 1980). In a later case, however, the same court rejected the "bright prospects" rule of *Zarcone*. *Cooper v. Singer*, 719 F.2d 1496, 1502 (10th Cir. 1983) (en banc). The "bright prospects" rule derives from the view that the purpose of § 1988 is to remove financial barriers to civil rights suits. *See id.* at 1501. In rejecting the "bright prospects" rule, the Tenth Circuit indicated that § 1988 has *numerous* purposes. One purpose is to facilitate civil rights litigation. § 1988 also penalizes obstructive litiga-

tion by civil rights defendants and deters civil rights violations, *see id.* at 1501; these two purposes are achieved by fee awards to rich and poor alike. Tenth Circuit precedent therefore strongly implies that ability to pay does not affect entitlement to fees.

The Tenth Circuit also indicates that the special circumstances rule only applies in the extraordinary case:

> While there have been decisions denying attorney's fees as unjust, these have been few and very limited. For example, one court declined to assess attorney's fees against defendants who were powerless to provide the remedy sought by the prevailing plaintiff [citations omitted]. The court did assess attorney's fees against the remaining defendants. Another court denied attorney's fees to a prevailing party whose conduct the court found outrageous. *Scheriff v. Beck*, 452 F. Supp. 1254, 1260 (D. Colo.) (Plaintiff's claim "was precipitated by an irrational, deliberate scheme to involve [defendant] in some type of litigation").

Love v. Mayor of Cheyenne, 620 F.2d at 237. Extraordinary factors like those identified by the Tenth Circuit are not present in the case before this court. Following the direction of the Tenth Circuit, this court holds that ability to pay attorneys' fees is not a special circumstance which precludes a fee award under § 1988.

The defendants also urge that administrative problems preclude an award of fees to the corporate plaintiffs. According to the defendants, an apportionment of fee payments throughout the defendant class would create significant administrative difficulties. In support of their argument, the defendants cite Judge Jenkins' order denying attorneys' fees in *Home Box Office, et al. v. Wilkinson et al.*, C-81-0331J (D. Utah Feb. 26, 1982), a case similar to the present case. Although the administrative difficulties in *Home Box Office* were similar to those in

the present case, the problems of apportionment are surmountable. The defendants imply the same by conceding the fee award to the individual plaintiffs. Vaguely described by the defendants, the administrative difficulties do not justify denying a fee award.

The *Home Box Office* order also emphasized that the defendants had not engaged in *conduct* that violated the plaintiffs' rights. The court acknowledges that the defendants in the present case acted in good faith by agreeing not to enforce the cable law pending outcome of the litigation. The Tenth Circuit has, however, ruled that a fee award is appropriate for a successful challenge to an unconstitutional ordinance even if the defendant acted in good faith. *Love v. Mayor of Cheyenne*, 620 F.2d 235, 236-37 (10th Cir. 1980). The court finds no special circumstances which should preclude an award of attorneys' fees to all plaintiffs in this action.

The court HEREBY GRANTS the plaintiffs' motion to include an award of reasonable attorneys' fees in the judgment. The court therefore approves the proposed judgment submitted by the plaintiffs on April 29, 1985. The date of the final judgment will conclude with the date of this order.

DATED this 28 day of June 1985.

/s/ Aldon J. Anderson
ALDON J. ANDERSON
United States Senior Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

C-83-0551A and C-83-0581A
(Consolidated)

COMMUNITY TELEVISION OF UTAH, INC., COMMUNITY CABLE OF UTAH, INC., UTAH SATELLITE, INC., WASATCH COMMUNITY T.V., INC.,

and

CONNIE R. JONES, LYNN F. JONES, CAROLINE A. SNOW, RLPH MCCLEARY, KAY ULRICH, ED ULRICH, WAYNE WILLIAMS, as individuals and as representatives of a class of persons similarly situated,

and

HOME BOX OFFICE, INC.,

Plaintiffs,

v.

HON. DAVID L. WILKINSON, Attorney General of the State of Utah, individually and in his official capacity and as a representative of the class of all persons empowered to enforce the Cable Television Programming Decency Act,

Defendants.

[Filed June 28, 1985]

JUDGMENT

Pursuant to the memorandum of opinion filed herein as well as Rules 56 and 58 Federal Rules of Civil Procedure,

IT IS HEREBY ORDERED AND ADJUDGED:

1. The Court has subject matter jurisdiction of these consolidated cases pursuant to 28 U.S.C. §§ 1331 and 1343. Venue is appropriate under 28 U.S.C. § 1391 since the claims arose in the District of Utah and the party Defendants are Utah residents.

2. There is no genuine issue as to any material fact and Plaintiffs are entitled to judgment as a matter of law.

3. The Utah Cable Television Programming Decency Act, Utah Code Ann. § 76-10-1701 to -1708 (Supp. 1983), is unconstitutionally overbroad and vague, and void on its face.

4. The Cable Communications Policy Act pre-empts the Utah Cable Programming Decency Act.

5. Plaintiffs' motion for summary judgment is granted, and the defendants' motion for summary judgment is denied.

6. Defendants are permanently enjoined from enforcing the Cable Television Programming Decency Act.

7. Costs are awarded to Plaintiffs.

8. The Plaintiffs are entitled, pursuant to 42 U.S.C. § 1988, to an award of reasonable attorneys fees. This Court reserves judgment on the specific award and shall set such matter down for consideration at a later date on appropriate application.

DATED this 28 day of June, 1985.

BY THE COURT:

/s/ Aldon J. Anderson
ALDON J. ANDERSON
United States Senior District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEPTEMBER TERM—SEPTEMBER 8, 1986

Before the Honorable James K. Logan, Honorable Bobby R. Baldock, Circuit Judges and Honorable Dale Saffels, District Judge *

(D.C. Nos. C-83-0551A and C-83-0581A)

CONNIE R. JONES; LYNN F. JONES; CAROLINE A. SNOW; RALPH MCCLEARY; KAY ULRICH; ED ULRICH; WAYNE WILLIAMS, as individuals and as representative of a class of persons similarly situated; COMMUNITY TELEVISION OF UTAH, INC.; COMMUNITY CABLE OF UTAH, INC.; UTAH SAFELLITE, INC.; and WASATCH COMMUNITY T.V., INC.,

Plaintiffs-Appellees,

HOME BOX OFFICE, INC.,

Plaintiff-in-Intervention-Appellee,

vs.

HONORABLE DAVID L. WILKINSON, Attorney General of the State of Utah, in his official capacity and as representative of a class of all persons empowered to enforce the Cable Television Programming Decency Act (S.B. 309),

Defendant-Appellant,

MORALITY IN MEDIA, INC., NATIONAL CABLE TELEVISION ASSOCIATION, INC., THE FREEDOM OF EXPRESSION FOUNDATION, INC.,

Amici Curiae.

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* Honorable Dale E. Saffels, United States District Judge for the District of Kansas, sitting by designation.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Utah, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 85-2157

CONNIE R. JONES, *et al.*,
Plaintiffs,

vs.

DAVID L. WILKINSON, Attorney General
of the State of Utah,
Defendant.

[Filed Nov. 21, 1986]

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that David L. Wilkinson, Attorney General of the State of Utah, the defendant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the three-judge circuit court affirming the judgment of the District Court for the District of Utah, Central Division granting summary judgment and awarding attorneys' fees, entered on September 8, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED this 21st day of November, 1986.

/s/ David L. Wilkinson
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MAILING CERTIFICATE

I hereby certify that I mailed a true and accurate copy of the foregoing notice of appeal, postage prepaid, this 21st day of November, 1986, to the following at their respective addresses:

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APPENDIX F

CABLE TELEVISION PROGRAMMING DECENCY ACT

Section

76-10-1701. Short title—Application.

76-10-1702. Definitions.

76-10-1703. Distribution of indecent material as nuisance.

76-10-1704. Enforcement—Civil penalties.

76-10-1705. Application limited to cable and pay-for-viewing programming.

76-10-1706. Defenses—Expert testimony as to indecency not required.

76-10-1707. Local regulation and application of other state laws not precluded.

76-10-1708. Separability.

76-10-1701. Short title—Application.

This act shall be known and may be cited as the "Cable Television Programming Decency Act." This act shall apply to cable television systems and pay-for-viewing television programming.

76-10-1702. Definitions.

As used in this act:

(1) "Knowingly" means an awareness, whether actual or constructive, of the character of the material involved. A person has constructive knowledge if a reasonable inspection or observation under the circumstances would have disclosed the nature of the material involved and if a failure to inspect

or observe is either for the purpose of avoiding the disclosure or is negligent.

(2) "Distribute" means to send, transmit, retransmit, telecast, disseminate, or cablecast by any means, including by wire or satellite, or to provide material to send, transmit, retransmit, telecast, disseminate, or cablecast.

(3) "Contemporary community standards" means those current standards in the vicinage where a nuisance alleged under this act has occurred or is occurring.

(4) "Indecent material" means a visual or verbal depiction, display, representation, dissemination, or verbal description of:

(a) A human sexual or excretory organ or function; or

(b) A state of undress so as to expose the human male or female genitals, public area, or buttocks, with less than a fully opaque covering, or showing of the female breast with less than a fully opaque covering of any portion below the top of the nipple; or

(c) An ultimate sexual act, normal or perverted, actual or simulated; or

(d) Masturbation

which the average person applying contemporary community standards for cable television or pay-for-viewing television programming would find is presented in a patently offensive way for the time, place, manner and context in which the material is presented.

76-10-1703. Distribution of indecent material as nuisance.

A person shall be deemed to have maintained a nuisance when, as a continuing course of conduct, he knowingly distributes indecent material within this state over any cable television system or pay-for-viewing television programming.

76-10-1704. Enforcement—Civil penalties.

(1) Enforcement of this act shall be by civil process only and subject only to the civil sanctions contained herein.

(2) An action under this act may be brought by the Utah state attorney general or by any county or city attorney in any district court where the nuisance alleged has occurred or is occurring and shall be subject to the Utah Rules of Civil Procedure.

(3) A person found to have maintained a nuisance shall be subject to a forfeiture in an amount not greater than $1,000, plus costs and reasonable attorney's fees.

(4) If a person has previously been found to have maintained a nuisance under this act, he shall be subject to a forfeiture in an amount not greater than $10,000, plus costs and reasonable attorney's fees.

76-10-1705. Application limited to cable and pay-for-viewing programming.

This act shall apply solely to cable television systems or pay-for-viewing television programming and shall not apply to over-the-air broadcasting by a radio or television station located within the State of Utah and licensed by the Federal Communications Commission pursuant to Part 73, Subpart E, of the FCC Rules and Regulations (47 CFR 73.601, et seq.). Nothing herein, however, shall preclude the application of this act to program material

originally broadcast or otherwise distributed by broadcast facilities located within or without the Sate of Utah and thereafter distributed by a cable television system or pay-for-viewing television programming located within the State of Utah.

76-10-1706. Defenses—Expert testimony as to indecency not required.

(1) It is an affirmative defense to an action under this act that the distribution of indecent material was restricted to institutions or persons having scientific, educational, govermental, or other similar justification for distributing indecent material.

(2) It is not a defense to an action under this act that the person was an employee, or otherwise was required to violate any provision of this act incident to his employment.

(3) No party to an action under this act shall be required to introduce expert witness testimony as to whether the material is or is not indecent, or as to any element of the definition of indecency, including contemporary community standards.

76-10-1707. Local regulation and application of other state laws not precluded.

This act does not preclude the following:

(1) The right of cities, counties, or other political subdivisions from further regulating the distribution of indecendent material over any cable television system or pay-for-viewing television programming; or

(2) The application of other laws of this state regulating the distribution of indecent material over any cable television system or pay-for-viewing television programming.

76-10-1708. Separability.

If any clause, sentence, paragraph or part of this statute or its application to any person or circumstance shall for any reason be adjudged by any court of competent jurisdiction to be invalid, the judgment shall not affect, impair, or invalidate the remainder of this statute or its application to other persons or circumstances but shall be confined in its operation to the clause, sentence, paragraph, persons or circumstances, or part directly involved in the controversy in which the judgment shall have been rendered.

APPENDIX G

CABLE TELEVISION INTENT STATEMENT

SUB.S.B.309—CABLE TELEVISION PROGRAMMING DECENCY ACT

In enacting this legislation, it is the intent of the Legislature to protect, in a broad sense, the rights of free speech guaranteed by the First Amendment to the U.S. Constitution as interpreted by the United States Supreme Court.

The technological advances in the communications industry during the past decades, have resulted in new and varied forms of communications. In addressing the impacts of these new forms of communication, the courts and legislative bodies have legitimately applied the protection of the First Amendment differently, depending upon the specific medium involved. Their interpretations have considered such factors as the pervasive presence in the community, the extent to which it invades the privacy of the home, and the accessibility of the medium to children.

In recent years, cable television has begun to establish a pervasive and widely available influence in the community, particularly the home. After a careful evaluation of the cable television medium, the legislature finds that cable television programming may legitimately be regulated because (1) children have access to cable television and, in many cases, are unsupervised by parents; (2) cable television receivers are in the home, a place where the individual's privacy interest is afforded and entitled to extra deference; (3) unconsenting adults may, without warning, tune into a cable television program where offensive language or depictions are being transmitted; and (4) because, as a practical matter, there is a limit to the number of cable television stations that a community will be able to franchise.

In view of these considerations, and with special awareness of the delicate task of balancing these concerns with the First Amendment rights to cablecasters and others, it is the purpose of this legislation to regulate the transmission of indecent material by cable television.

APPENDIX H

[SEAL]

THE ATTORNEY GENERAL
STATE OF UTAH

DAVID L. WILKINSON
Attorney General

236 State Capitol Telephone 801-533-5261
Salt Lake City, Utah 84114

DATE: 17 October 1983

FORMAL OPINION NO. 83-001

REQUESTED BY:

Rodney S. Page, Esq.
Davis County Attorney

PREPARED BY:

David L. Wilkinson, Attorney General

REGARDING:

Cable Television Programming Decency Act of 1983

QUESTIONS:

1. Is the Act a "Time, Place and Manner" regulation of cable TV and, if so, does it require that there be some time during a 24-hour period when "indecent" programming may be shown without violating the Act?

2. If the Act does require that there be some time during the 24-hour "day" when indecent pro-

gramming may be shown without violating the Act, what are the hours of such a time?

3. For a defendant to have engaged in a "continuing course of conduct" so as to violate the Act, how many times must he/she have presented indecent material and within what time duration?

4. What reliance may be placed on the fact that a movie shown on cable TV has been rated G, PG or R by the Motion Picture Association of America (MPAA)?

ANSWERS:

1. Yes, see text.
2. See opinion.
3. At least 3 times in a 90-day period.
4. See opinion.

OPINION

STATEMENT OF PROBLEM

In your letter dated September 26, 1983, as supplemented by our telephone conversation shortly after your letter arrived, you indicated that although the Cable Television Programming Decency Act ("the Act") enacted in the 1983 General Session of the Legislature is not presently being enforced pending the outcome of a motion for preliminary injunction lodged by plaintiffs-cablecasters,[1] the four specific points you wish to have

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[1] On the day the lawsuit was filed by the cablecasters, *(Community TV of Utah v. Wilkinson)*, this office agreed not to enforce the Act pending the Court's determination of their motion for preliminary injunction. Since then, the parties have agreed to have the Court decide the motion for preliminary injunction as part of the Court's determination of the whole case on its merits.

me address, as listed above, should be the subject of an attorney general's opinion pursuant to UCA 67-5-1(6) (1953). I concur, and submit the following by way of opinion and guidelines for your use.

ANALYSIS

1. *Is the Act a "Time, Place and Manner" regulation of cable TV and, if so, does it require that there be some time during a 24-hour period when "indecent" programming may be shown without violating the Act?*

In answering this question, one should bear in mind that the State of Utah is not required to regulate the content of cable TV programming to the maximum extent permitted by the United States and Utah Constitutions and, indeed, is not required to regulate it at all. Whatever the outer limits of permissible state regulation under applicable constitutional law[2] are, the Legislature was free to enact a bill which stopped short of reaching those outer limits. Secondly, one should remember that before and after the passage of the Act, Utah's principal statutory means of combatting the real and perceived dangers to society of pornography in its broadest sense (not as a legal term of art) was, and undoubtedly still is, Utah's anti-obscenity law. A comparison of the criminal sanctions attaching to the latter (U.C.A. §§ 76-10-1204, 1214, (1981 Supp.)) with the modest civil sanctions attaching to the Act should leave little doubt as to which law would have a greater effect upon the showing of the material at which the two laws are aimed, respectively. Much of the public discussion which surrounds the Act seems to lose sight of this fact. Any material shown on cable TV at whatever time of day or night which comes within the proscription of Utah's anti-obscenity law subjects those legally responsible to criminal sanctions, including prison time.

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[2] United States Constitution, Amendment I; Utah Constitution, Article I, Section 15.

As you no doubt know, the Act was passed because the Legislature perceived the need for an additional statutory weapon to deal with cable TV programming which did not come under the carefully drawn legal definition of "pornography" which Utah adopted after the United States Supreme Court in *Miller v. California* clarified how far a state could go in altogether *prohibiting* certain material—material which then, and, in many jurisdictions, is still now widely available in bookstores, adult theaters, and similar public outlets. The Legislature expressly intended to "regulate the transmission of [non-obscene] indecent material by cable television" while at the same time to "protect, *in a broad sense*, the rights of free speech guaranteed by the First Amendment to the U.S. Constitution as interpreted by the United States Supreme Court." Cable Television Intent Statement, Substitute S.B. No. 309, read by its sponsor, Sen. Paul Rogers, on the floor of the Senate, and by its House floor sponsor, Rep. James Moss, on the floor of the House of Representatives on March 2, 1983 and March 7, 1983, respectively (emphasis added). A copy of the "Intent Statement" is attached herewith. Nowhere in the Act, its intent statement, or anywhere else in its legislative history, is there any express indication of an intent to regulate cable TV programming to the maximum extent allowed by the First Amendment. Indeed, the language of the intent statement quoted above, and underlined, suggests, if anything, the Legislature's desire to weigh any doubt as to the Act's constitutionality in favor of the "rights of cablecasters and others." *Ibid.* It would have been easy for the Legislature to say the Act was intended to regulate the content of cable TV programming to the maximum extent permitted by the free speech clause of the First Amendment to the United States Constitution.[3] However, this was not done.

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[3] This was done in the context of Utah's "Long Arm Statute." U.C.A. § 78-27-22 (1953).

Keeping in mind these preliminary observations, it is not a particularly close question as to whether the Legislature intended that there be some period during a 24-hour "day" during which "indecent material might be shown on cable TV without violating the Act. The controlling language is found in the definition of indecent material. That definition, found in Section 2(4) of the Act,[4] reads:

> (4) "Indecent material" means a visual or verbal depiction, display, representation, dissemination, or verbal description of:
>
> (a) A human or sexual or excretory organ or function; or
>
> (b) A state of undress so as to expose the human male or female genitals, pubic area, or buttocks, with less than a fully opaque covering, or showing of the female breast with less than a fully opaque covering of any portion below the top of the nipple; or
>
> (c) An ultimate sexual act, normal or perverted, actual or simulated; or
>
> (d) Masturbation
>
> which the average person applying contemporary community standards for cable television or pay-for-viewing television programming would find is presented in a patently offensive way *for the time, place, manner and context in which the material is presented* (emphasis added).

That the drafters of the Act intended it to be a "time, place and manner" *regulatory* act, and not a *prohibitory* act, is abundantly clear from the language they employed in the last two lines of the Act's key definition. Their use

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[4] The Act has been codified as §§ 76-10-1701 through 1708 by The Allen Smith Company. The Act itself did not attempt to "spot" itself within the Utah Code. The Act should not have been "spotted" in the Criminal Code since it is not criminal in nature.

of the phrase "time, place, manner and context" was no accident. That language did not appear in the Legislature's ill-drafted 1981 bill (U.C.A. § 76-10-1228 (1981 Supp.)), struck down as unconstitutional in *Home Box Office v. Wilkinson*, 531 F. Supp. (D. Utah 1982). Nor did it appear in the definition of indecency included in the ordinance of Roy City, struck down in *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982). Nor does it appear in the definition of indecent material found in the "model" espoused by Morality in Media, a New York City-based national anti-obscenity organization, from which model much of the rest of the definition of "indecency" is taken.[5] The choice of the phrase, "time, place, manner and context" was deliberate and obviously designed to import a substantial body of First Amendment case law into the Act.

The consequences of the Legislature intending the Act as a "time, place, and manner" regulation are legally crucial. If a regulation is deemed a time, place, and manner regulation of speech, the strict scrutiny normally required under First Amendment analysis does not apply. *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613, 2620 n. 17 (1982). Rather, time, place, and manner restrictions must be upheld if they are found to reasonably advance important state interests. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n. 18 (1980). To be

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[5] Morality in Media's model definition of indecency, in their Model Cable Television Law, reads:

> (1) (e) "Indecent material" shall mean material which is a representation or verbal description of:
>
> 1) a human sexual or excretory organ or function; or
>
> 2) nudity; or
>
> 3) ultimate sexual acts, normal or perverted, actual or simulated; or
>
> 4) masturbation;
>
> which, under contemporary community standards for cable television, is patently offensive.

reasonable, however, time, place, and manner restrictions on communication must leave open some alternative times, places, and manners, for that communication to occur. *Schad v. Mt. Ephraim*, 452 U.S. 61, 75-76 (1981); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981); *Kovaks v. Cooper*, 336 U.S. 77, 83-85 (1949). It appears that a total ban on communication, even if limited to a total ban on one particular medium, probably will not be found a reasonable time, place, or manner restriction. *Schneider v. State*, 308 U.S. 147, 163 (1939); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 540, 556 (1975).

From the foregoing United States Supreme Court caselaw, it appears clear that the Act's usage of the phrase "time, place, manner and context" in its definition of indecent material, requires that indecent material not be banned at all times from being shown on cable TV.[6] It may be argued that the Legislature did not know the consequences of using the words "time, place, manner and context," and subjectively intended to ban indecency on cable TV at all times. However, there is no evidence of this. To the contrary, the legislative history of the Act shows the Legislature knew exactly what it was doing in using those words.

The chief sponsor of S.B. No. 309, Sen. Paul Rogers (R, Orem), said in explaining the bill:

> "Senate Bill No. 309 is a permissive bill admittedly. so it does allow much of what may be personally offensive to me or to many others to still be cablecast in Utah. It is not a ban, it is not a prohibition. It does however set up minimum criteria which when implemented will tend to have a restrictive influence

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[6] The Act's intent statement, quoted *supra*, begins by expressing the Legislature's intent "to protect, in a broad sense, the rights of free speech guaranteed by the First Amendment . . . *as interpreted by the Supreme Court* (emphasis added)."

> over indecent material which . . . [would otherwise] be widely distributed and cablecast during all different times of the day . . . [Y]ou may have masturbation or intercourse taking place over your cable television screen, that at least it may be at a time when fewer younger members of our population for example may be present . . . ."

Also during the veto-override session, Sen. Karl Swan (D, Tooele), one of only two senators to address questions to the bill's principal draftsman on the floor of the Senate, stated:

> "If it [S. 309] has the effect of restricting the times that some of the other [indecent] things are shown . . . I think the public will be well served . . . and the First Amendment will still be very viable."

Finally, the House floor sponsor, Rep. Moss (R, Orem) stated, in introducing the bill in the veto-override session:

> "[The bill] is not in fact a prohibition on broadcast [sic] of all sexual activity over cable television . . . Now prior attempts in this area have required a blanket prohibition on certain forms of speech that go beyond the standard of pornography . . . . The bill that you have before you is a much more moderate bill than that and would not preclude even the kind of things that were broadcast in the Pacifica case. . . . There can obviously then be times during the course of a day or night when given the time, place, manner and context of broadcast [sic], material would not be found to be indecent. . . . Now that is not a blanket prohibition."

Later, in summing up argument for the bill, Rep. Moss said: "This bill will not take the place of parents. As I've indicated to you, there will still be great amounts of what I consider to be indecent material that will go out over the cable television system."

Between the time the Act was initially passed by overwhelming margins of both houses and the time the Governor vetoed it, I wrote and sent the Governor an opinion, which he had requested, on the bill's constitutionality. The Legislature, of course, overrode the veto *after* that opinion issued. The opinion received considerable publicity in the local media within a day or two after its issuance on March 29, 1983. This office gave copies of it to a number of individual legislators before the Legisuature overrode the Governor's veto. Under the circumstances, that opinion would seem to have become part of the Act's legislative history. That opinion, a copy of which is attached hereto, makes clear my belief that the Act was intended to *regulate*, not *prohibit*. In a word, I felt the Act was a time, place, and manner regulation, which "does not totally ban all nonobscene, indecent transmissions from cable television." (p. 8 of the opinion).

I expressly refrain from opining that the First Amendment does not allow a total prohibition of indecency on cable TV. To answer your specific question, I do not need to delineate the precise limits of the First Amendment. It appears clear that even assuming a total ban would be constitutionally permissible, the Utah Legislature chose not to impose such a ban. The answer to both parts of your first question must therefore be in the affirmative.

2. *If the Act does require that there be some time during the 24-hour "day" when indecent programming may be show vithout violating the Act, what are the hours of such a time?*

In answering this question, I hasten to state the obvious: No public lawyer or judge can specify the precise hours of each 24-hour period when indecency may be lawfully shown under the Act without functioning to some extent as a legislature. This is obvious because the Legislature simply did not specify the precise hours

in the Act. However, this is not to say the Legislature did not have in mind a governing idea as to what those hours should be. A key legislative finding, expressed in the Intent Statement, is that "children have access to cable television and, in many cases, are unsupervised by parents." This legislative finding lies at the heart of the United States Supreme Court's opinion in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The *Pacifica* case was well known to the Legislature in its deliberations over the Act. It was inferred to many times in the legislative debates, being characterized by Rep. Moss, for instance, as "the prime case upon which the bill you are now considering rests." *Pacifica* is also the keystone of my opinion to the Governor on the Bill's constitutionality, which opinion was before the Legislature when it overrode his veto. Fully half of that nine-page opinion is devoted to a discussion of that case and its applicability to this Act. It is not engaging in a fiction of statutory construction to say that the Legislature imported the principles of that case into its Intent Statement. That case, combined with common sense, suggests the Legislature's intent that indecent material could at most only be shown lawfully during "late evening hours."

In emphasizing the narrowness of the Commission's order in *Pacifica*, (which the Court upheld), Justice Powell, in a crucial concurring opinion, with which Justice Blackmun joined, stated:

> "On its face, [the order] does not prevent respondent Pacifica Foundation from broadcasting the monologue *during late evening hours* when fewer children are likely to be in the audience. . ." *Ibid.*, at 760 [emphasis added].

The Powell concurring opinion stressed the factor of parental supervision of children as a key consideration in its rationale.

> "The Commission's primary concern was to prevent the broadcast from reaching the ears of unsupervised children who were likely to be in the audience at that hour. In essence, the Commission sought to 'channel' the monologue to hours when the fewest unsupervised children would be exposed to it. See 56 F.C.C. 2d, at 98. In my view, this consideration provides strong support for the Commission's holding." *Ibid.*, at 757.

Justice Powell also differentiates the broadcast media from other disseminators of "this kind of speech" in that whereas "[s]ellers of printed and recorded matter and exhibitors of motion pictures and live performances may be required to shut their doors to children" without restricting the access of adults to such material,

> "such a physical separation of the audience cannot be accomplished in the broadcast media. During most of the broadcast hours, both adults and unsupervised children are likely to be in the broadcast audience, and the broadcaster cannot reach willing adults without also reaching children." *Ibid.*, at 758.

The above observations come within my power (and duty) to render opinions to county attorneys. In attempting to delineate the precise "late evening hours" during which indecency may lawfully be shown under the Act, I exercise my supervisory powers over county attorneys pursuant to U.C.A. 67-5-1(5) (1953). In other words, I cannot specify these hours by way of rendering an opinion of law, since obviously the Legislature in its wisdom has chosen not to specify them; however, as the Attorney General with supervisory powers over all county attorneys and as one of the public attorneys charged with enforcing the Act, I am empowered to issue enforcement guidelines to promote a uniform application of the Act. That is to say, my statements may not be

controlling as to what may lawfully be broadcast and when, but they will be controlling as to what this office will or will not do by way of enforcing the Act.

In issuing such guidelines, I feel compelled to look for clues in the *Pacifica* opinion as the lodestar in this "relatively new and difficult area of the law." *Ibid.*, at 756, Powell, J. Unfortunately, such clues are scarce. One such clue, however, is found in the dissenting opinion of Judge Leventhal when the case was decided by the Court of Appeals, 556 F. 2d 9 (1977). Judge Leventhal was unwilling to overturn the Commission's order disciplining the radio station, but he was somewhat troubled, based on the record before him, with the order's suggestion that the material in question might only be broadcast during "the late hours of the evening." He noted that the Commission's order carried with it a "limitation of time—*the afternoon.*" Although he found no fault with that time limitation in the order, he offered dicta to suggest that the expansion of that time limitation to include the *early evening* raised different considerations, i.e., a greater percentage of children exposed to broadcasting might be under parental supervision at that time. Thus he tangentially raised, although in dictum, the difficult question facing us here. However, the concurring justices were apparently unwilling to follow Judge Leventhal's lead and to question the Commission's suggestion that late evening hours might be the only time indecency might be broadcast. Justice Powell's observation that "[*d*]*uring most of the broadcast hours,* both adults and unsupervised children are likely to be in the broadcast audience," appears to suggest that when he and Justice Blackmun refer to "late evening hours," they mean those hours in contradistinction to the early evening hours referred to by Justice Leventhal, to whose "thoughtful opinion" they expressly refer. *Ibid.*, p. 757. In other words, Justice Powell and Justice Blackmun, along with the three-member plurality, do not take ex-

press issue with the Commission's language appearing to relegate material like the Carlin monologue to late evening hours.

At this point, any specification of late evening hours must contain an element of arbitrariness. If one were to specify those hours as being, for instance, from 2 a.m. to 4 a.m., or even from 1 a.m. to 6 a.m., a court would likely consider the time span too restrictive and could hold the application of the Act unlawful. The key question is, at which hours are the fewest children unsupervised, considering the First Amendment need to have more than just a nominal time span duration during which indecency may be lawfully shown. Weighing this question against the language of the Act's Intent Statement protecting, "*in a broad sense*," rights of free speech, I do not plan to enforce the Act based on any program containing indecency which begins after midnight or which ends by seven o'clock in the morning, and I would advise and direct (to the extent of my statutory authority) county attorneys to do likewise.

I reiterate the second preliminary observation I made on page 3 of this opinion: Utah's anti-obscenity law, with its criminal sanctions, is available for use against cablecasters which present material at any time of the day or night which is pornographic in the legal sense. This office intends to enforce the Utah anti-obscenity law against cablecasters where appropriate and urges county and city attorneys to do likewise.

3. *For a defendant to have engaged in a "continuing course of conduct" so as to violate the Act, how many times must he/she have presented indecent material and within what time duration?*

As in the case of your second question, this question requires me to mix my separate and distinct functions of rendering opinions of law, on the one hand, and exer-

cising my supervisory powers over county attorneys on the other.

It is clear from both case law and common sense that "continuing course of conduct" does not mean one incident. *Calvin v. Conlish*, 520 F.2d 1, 6 (1975, U.S. 7th Circuit); *Maryland Telephone Union v. Chesapeake & Potomac Tel. Co. of Md.*, 187 F. Supp. 101, 109 (1960, U.S. Dist. Ct. Md.). What the cases do not tell us, however, is the frequency necessary to constitute a continuous course of conduct. Nor do the legislative debates surrounding the Act help. Pursuant to my supervisory powers, I suggest, as I did in answering your second question, that you adopt the same guidelines as I, which are that no action will be brought by this office unless and until the same defendant has presented indecent material at least three times within a ninety-day period. Of course, indecent material shown between midnight and seven a.m. will not be counted by this office in determining the degree of frequency necessary to constitute a continuing course of conduct.

4. *What reliance may be placed on the fact that a movie shown on cable TV has been rated G, PG or R by the Motion Picture Association of America (MPAA)?*

The act is not limited in its applicability to movies. To the extent that movies are involved, however, this office plans to observe the following guidelines:

If a movie has received a PG rating, this office will action is contemplated.

If a movie has received a PG rating, this office will presume it contains no indecency.

If a movie has received an X rating, this office will presume it contains indecency.

However, the fact that a movie has been rated R by the MPAA will raise no presumption either way.

Each R-rated movie would have to be approached on an individual basis.

I urge, pursuant to my supervisory powers, that all county attorneys follow these guidelines. I also urge that city attorneys follow these same guidelines.

Very truly yours,

/s/ David L. Wilkinson
DAVID L. WILKINSON
Attorney General

DLW:rma
Attachment

[SEAL]

THE ATTORNEY GENERAL
STATE OF UTAH

236 State Capitol
Salt Lake City, Utah 84114
Telephone 801-533-5261

29 March 1983

The Honorable Scott M. Matheson
Governor, State of Utah
210 State Capitol
BUILDING MAIL

Re: *SB No. 309*

Dear Governor Matheson:

We received in the late afternoon of March 21 your letter requesting our opinion on the constitutionality of SB No. 309, The Cable Television Programming Decency Act. This bill provides that the knowing distribution of indecent material over any cable television system or pay-for-viewing television programming within the state *as a continuous course of conduct* constitutes a nuisance. A civil action may be maintained by the State Attorney General or any county or city attorney, and a civil forfeiture of up to $1,000.00 plus costs and attorneys' fees may be assessed against any person found to have violated the act. For subsequent violations, the forfeiture may be as high as $10,000.00. The act explicity provides a defense for persons having scientific, educational, or governmental justifications for distributing material which would otherwise be proscribed.

It is my opinion that SB No. 309 is not unconstitutional and could be successfully defended if challenged in court.

I. REGULATION OF THE DISTRIBUTION OF NON-OBSCENE INDECENT MATERIAL OVER CABLE TELEVISION IS NOT PER SE UNCONSTITUTIONAL.

A. *The United States Supreme Court Has Upheld The Regulation of Indecent Material.*

The foundation authority for the constitutionality of the regulation of nonobscene "indecent" material is *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The First Amendment analysis of Justice Stevens, who wrote the plurality opinion for the Court, provides some clear guidelines for permissible state regulation of the distribution of nonobscene indecent material.

Pacifica involved the issuance by the FCC of a Declaratory Order reprimanding Pacifica Foundation for its radio station broadcasting a twelve-minute monologue by George Carlin, "Filthy Words," one afternoon in October, 1973. A complaint was received from a man who stated that he heard the broadcast while driving in his car with his young son. The FCC did not impose formal sanctions but put the Declaratory Order into the station's license file to be considered in the event that further complaints were received. The station owner appealed to the D.C. Court of Appeals, which overturned the FCC Order. Then the FCC appealed, and the Supreme Court reversed the judgment of the Court of Appeals.

The Supreme Court initially interpreted the statute giving the FCC the authority to regulate broadcasters and found that it authorized the regulation of nonobscene indecent material, as well as purely obscene material. Then the Court proceeded to the First Amendment question, which it defined as "whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances." 438 U.S. at 746. In his plurality opinion, Justice Stevens concluded that

it did not, and upheld the action of the FCC on the basis of five critical points:

(1) the regulation of the content of communication is sometimes permissible;

(2) First Amendment analysis varies greatly according to the medium through which the message is communicated;

(3) broadcasting is entitled to less First Amendment protection because of its "pervasiveness presence in the lives of all Americans" and because of the accessibility of children to the broadcast media;

(4) the FCC action constituted a reasonable restriction of the time, place, and manner of broadcasting indecent material; and

(5) the sanction imposed was noncriminal.

The Court acknowledged that there were two particularly important reasons why the First Amendment does not prohibit reasonable time, place and manner restrictions of indecent broadcasts.

> "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. . . . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up an indecent phone call, but that option does not

give the caller a constitutional immunity or avoid a harm that has already taken place.

"Second, broadcasting is uniquely accessible to children, even those too young to read. . . . Other forms of offensive expression may be withheld from the young without restricting the expression at its source. . . . We held in *Ginsberg v. New York*, 390 U.S. 629, that the government's interest in the well-being of its youth and in supporting parents' claim to authority in their own household, justified the regulation of otherwise protected expression. . . . The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting." 438 U.S. at 748-750.

In conclusion, Justice Stevens emphasized the factors which supported the Court's judgment that the FCC action did not violate the First Amendment:

"This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify criminal prosecution. *The Commission's decision rested entirely on a nuisance rationale under which context is all-important.* The concept requires a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote, a nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barn. *Euclid v. Amber Realty Co.*, 272 U.S. 365, 388. We simply hold that when the Commission finds that a pig has entered the

parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene." 438 U.S. at 750, 751 (emphasis added).

B. *First Amendment Standards Depend Upon the Medium.*

It is clear that the First Amendment applies to the regulation of cable television. "Cable operators, like publishers and wireless broadcasters, are entitled to First Amendment protection." *Community Communications Co. v. City of Bounder, Colorado*, 660 F.2d 1370, 1377 (10th Cir. 1981), *rev'd on other grounds*, 102 S.Ct. 835 (1982); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1052-57 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979). Exactly how First Amendment protection will be applied to cable television is not clear.

The nature of First Amendment protection varies depending on the character of the medium being regulated. "Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 501 (1981). "Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it . . ." *Id.* at n.8. "[D]ifferences in the characteristics of the new media justify differences in the First Amendment standards applied to them." *Red Lyon Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). Thus, the constitutionality of the regulation of indecent material transmitted over cable television systems will be assessed by First Amendment standards molded to suit that particular medium.

C. *The Pacific Standard Is Likely To Apply To Cable Television.*

Since the "nature and degree of protection afforded to First Amendment expressions in any given medium de-

pends upon the medium's particular characteristics," *Community Communications Company v. City of Boulder*, 660 F.2d at 1377, it will be necessary to compare the characteristics of cable television with those of other communications media.

It is clear that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica*, 438 U.S. at 748. On the other hand, newspapers and print media have received the greatest First Amendment protection. *Id.*; *See also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); Minnesota tax case issued March 29, 1983 (reported on radio), holding First Amendment prohibits a state tax on newspaper stock and printers ink.

Cable television is a new industry. To date, almost all of the litigation regarding cable television has arisen in the context of the regulation of access (mandatory access rules), channel capacity, licensing, etc. *See, e.g., Midwest Video v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979); *Community Communications Co. v. Boulder City*, 660 F.2d at 1377 (10th Cir. 1981), *rev'd on other grounds*, 102 S.Ct. 835 (1982). *See further* Kreiss, *Deregulation of Cable Television and the Problem of Access Under the First Amendment*, 54 S. Cal. L. Rev. 1001 (1981). Although a few cases examining the validity of channel access restrictions have compared cable television to newspapers, *see, e.g., Midwest Video*, 571 F.2d at 1056; *Home Box Office v. FCC*, 567 F.2d 9, 43-51 (D.C. Cir. 1977); *Community Television of Utah, Inc. v. Roy City*, —— F.Supp. —— (D. Utah, Dec. 22, 1982), the better analysis has distinguished cable television from newspapers and compared it to broadcasting. An excellent Tenth Circuit opinion in *Community Communications* held that "the attributes of cable broadcasting technology indicate that the nearly absolute strictures against direct government regulation of newspapers' dissemination of information cannot be

applied in wholesale fashion to cable operators." 660 F.2d 1377. Judge Seymour's opinion stressed two significant distinctions between cable broadcasting and newspaper printing for purposes of First Amendment analysis. First, a newspaper need not use public property to disseminate information, while cable operators, because of their need to use public domain, are tied to the public government "in a way that . . . newspapers are not." *Id.* at 1378. Second, there is the particular problem of "medium scarcity" in the cable television industry, *i.e.*, there are physical and economic limitations on the number of cable systems that can practically operate in a given geographic area which do not exist in the case of newspaper publishers. *Id.*; *see also* Kreiss, 54 S. Cal. L. Rev. at 1005. Furthermore, from the point of functional First Amendment analysis, unlike newspapers, cable television systems are not primarily "communicators, but, like broadcasters, are primarily 'conduits'." In fact, Professor Kreiss has emphasized that "[c]able systems act as conduits more than either newspapers or broadcasters." *Id.* at 1026.

Pacifica is likely to apply to cable television because the two significant factors, noted by the Court as justifying reasonable time, place and manner restrictions of the broadcast media, are present in the cable television medium also. Cable television is rapidly assuming a position of "pervasive presence" in the lives of Americans. An FCC *Information Bulletin* (March, 1982) reports that "[b]y the end of 1981 approximately 4,600 cable systems served more than 20 million subscribers in some 12,600 communities." *Id.* Cable television systems are operating in every state of the United States. *Id.* Moreover, cable television, like ordinary television, "is uniquely accessible to children, even those too young to read." *Pacifica*, 438 U.S. at 749. Like broadcast television, cable transmission "comes directly into the home," where "a different order of values obtains . . ." *Id.* at 759 (Powell, J. concurring, joined by Blackmun, J.)

In his *Roy City* opinion, U.S. District Judge Bruce Jenkins tried earnestly to distinguish *Pacifica.** He created a "laundry list" of characteristics of cable television on the one hand, and compared it with a similar list of characteristics of broadcast television and radio on the other (e.g., limited advertising versus extensive advertising; transmission through wires versus transmission through airwaves, etc.). Then he emphasized three distinctions between the two types of media which, he concluded, made *Pacifica* "irrelevant" when assessing the constitutionality of cable television regulations. "First, one may choose to subscribe or one may choose not to subscribe to a cable service." Civil No. NC 82-0122J, slip op. at 7. Second, "cable provides a larger number of channel and subject choices than does broadcast." *Id.* Finally, he insisted that cable television is not "pervasive" because "[l]iterally [pervasive] means ever-present. It is in the air, or diffused widely. In that sense broadcasting meets the definition. In that sense, it is pervasive because its medium, the air, is pervasive. Transmission by wire is not." *Id at 8.* It is very likely, however, in view of the pervasiveness of cable TV and its accessibility to children, discussed above, that the Tenth Circuit and the Supreme Court will insist upon much more sophisticated analysis of the First Amendment policies implicated than that employed by Judge Jenkins.

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* In an earlier case, *HBO v. Wilkinson*, 531 F.Supp. 987, (D. Utah 1982), Judge Jenkins inexplicably omitted any mention of *Pacifica* from his 16-page opinion, although it was cited and argued to him repeatedly.

II. S.B. 309 IS LIKELY TO BE UPHELD AS A REASONABLE TIME, PLACE AND MANNER REGULATION OF CABLE TELEVISION.

A. *Time, Place and Manner Regulations Are Not Subject to Strict Scrutiny.*

It is important to recognize that if a regulation is deemed a time, place and manner regulation of speech, the strict scrutiny normally applied under First Amendment analysis will not apply. *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613, 2620 n.17 (1982). Rather, time, place, and manner restrictions will be upheld if they are found to reasonably advance important state interests. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18. (1980).

B. *There Are Several Important State Interests Affected By S.B. 309.*

The two key interests identified by a majority of the Supreme Court as justifying reasonable regulation of nonobscene, indecent broadcasts, were protecting children and protecting the privacy of the home. 438 U.S. at 749, 749, and *id.*, at 757-762 (Powell and Blackmun, JJ., concurring). The essence of the concern is that parents are entitled to the support of the State in protecting their children from inappropriate material. Yet parents ought not to be forced to forego the benefits of a particular medium simply to protect their children from inappropriate broadcasts at times when it is more likely that large numbers of children would be in the listening or viewing audience. Moreover, there is a legitimate interest in protecting those who do not wish to view indecent material in their homes, even accidentally or inadvertently.

It is worth noting that both of these concerns were identified as the primary purposes of S.B. 309 in the Statement of Intent that was read on the floors of the

Senate and House, respectively, when S.B. 309 was introduced. A copy of that statement is attached.

C. *S.B. 309 Significantly Enhances These Important State Interests.*

To be "reasonable," time, place and manner restrictions of speech must leave open some alternative times, places and manners of communication. *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981); *Hefron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981); *Kovaks v. Cooper*, 336 U.S. 77, 85 (1949). It is clear that a total ban on communication, even if limited to a total ban on one particular medium, probably will not be found to be a reasonable time, place, or manner restriction. *Schneider v. State*, 308 U.S. 147, 163 (1939); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 540, 556 (1975).

S.B. 309 does not totally ban all nonobscene, indecent transmissions from cable television. In fact, it does not by its own terms ban any. Rather, it establishes a definite legal principle whereby the cable television industry in Utah can govern itself. That principle is that depictions or descriptions of sexual or excretory acts or functions must be transmitted only at "the time, place, manner and [in the] context" in which it would not be "patently offensive" to the "average person applying contemporary community standards for cable television." *Moreover, mere isolated incidents do not violate the Cable Television Programming Decency Act—only the distribution of indecent material "as a continuing course of conduct."* Thus, S.B. 309 is reasonable because it is flexible. It does not aim to, and will not, prevent Utahns from viewing quality movies like *Kramer v. Kramer* on the basis of the tastefully—or even distastefully—done scene or two which may offend some viewers. Rather, it aims primarily to brand as a nuisance a cable channel like "Pussycat"—already operating in other states—which

continually shows "blue" movies and which a great majority of Utahns would agree was not only patently offensive but contributory to antisocial or even criminal behavior. See *Paris Adult Theatre I. v. Slaton*, 413 U.S. 49, 58 (1973), identifying as a possible state interest served by anti-obscenity laws "the public safety itself."

S.B. 309 is not vague. It propounds a principle, not an administrative regulation. But that principle is clear. Moreover, the Supreme Court emphasized in *Pacifica* that "indecency is largely a function of context—it cannot be adequately judged in the abstract." 438 U.S. at 742. The Utah Legislature has wisely chosen not to attempt to ban indecent material in the abstract. It has also chosen to have the courts, and not an administrative body like the FCC, determine whether a nuisance exists under the Act.

It is important to note that S.B. 309 does not provide criminal penalties for its violation. Rather, the sanctions are civil forfeiture. This factor was significant in the *Pacifica* analysis as well, as Justice Stevens not only mentioned it in the text of his opinion, but devoted a lengthy note emphasizing the absence of criminal sanctions in that case. 438 U.S. at 750, 739 n.13. Like in *Pacifica*, the regulatory approach of S.B. 309 is the nuisance rationale. *Id.*, at 750.

III. CONCLUSION.

It thus appears that S.B. 309 does not violate the First Amendment. If challenged, it is likely to be upheld eventually (even though Judge Jenkins of the local U.S. District Court would evidently hold that it is unconstitutional*). This bill deals, of course, with a very contro-

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* If S.B. 309 becomes law and is challenged in the United States District Court for Utah, the chances are one in three that the case would be assigned to Judge Jenkins. I am assured it was pure coincidence that both the *HBO* and *Roy City* cases were assigned to him.

versial subject, and has aroused the passions of many people. But under dispassionate constitutional analysis, it is not likely to be found to be unconstitutional per se. Of course, like any law, it could be given an unconstitutional application. That, however, would depend upon the enforcement of it. A veto of the bill on the ground that it might be applied unconstitutionally could not be supported as a veto urged by this opinion.

Very truly yours,

/s/ David L. Wilkinson
DAVID L. WILKINSON
Attorney General

DLW:rma

Attachment

P.S:. Although not germane to this opinion, response should be made to the claims that the cost of defending S.B. 309 would approach $500,000. The cost to the State of defending an earlier cable TV bill was only $5,000.

APPENDIX I

§ 558. Criminal and civil liability

Nothing in this subchapter shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 532 of this title or under similar arrangements.

No. 86-1125

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DAVID L. WILKINSON, Attorney General
of the State of Utah,

Appellant,

—v.—

CONNIE R. JONES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

MOTION TO AFFIRM

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February 20, 1987

QUESTIONS PRESENTED

1. Whether the Utah Cable Programming Decency Act is unconstitutionally vague for failing to set forth identifiable standards of conduct?

2. Whether the Utah Cable Programming Decency Act is an unconstitutional restriction of speech protected by the First Amendment?

3. Whether the Utah Cable Programming Decency Act is preempted by the Cable Communications Policy Act, 47 U.S.C. § 521 *et seq.* (Supp. III 1985)?

STATEMENT PURSUANT TO RULE 28.1

Pursuant to Rule 28.1 of the Rules of this Court, appellee Home Box Office, Inc. advises the Court that its parent corporation is Time, Inc. Neither Time, Inc. nor Home Box Office, Inc. has an interest in any subsidiary company or affiliated company whose stock is publicly held except for American Television and Communications, Inc.

Appellees Community Television of Utah, Inc., Community Cable of Utah, Inc., Utah Satellite, Inc., and Wasatch Community T.V., Inc. are all wholly-owned subsidiaries of Telecommunications, Inc. Community Television of Utah, Inc., Community Cable of Utah, Inc., Utah Satellite, Inc. and Wasatch Community T.V., Inc. have no subsidiaries. Telecommunications, Inc. has no interest in any subsidiary company whose stock is publicly held. Telecommunications, Inc. holds ten percent or more of the shares of the following companies: United Artists Communications, Inc., United Cable Television Corporation, Telecrafter Corporation and C.O.M.B., Co. *Cf.* 17 C.F.R. § 230.405.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1125

DAVID L. WILKINSON, Attorney General
of the State of Utah,

Appellant,

—v.—

CONNIE R. JONES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

MOTION TO AFFIRM

Appellees move to affirm the decision below on the ground that the questions necessary to the disposition of this appeal are so unsubstantial as not to warrant this Court's plenary consideration.

STATEMENT OF THE CASE

This appeal arises out of a constitutional challenge to a 1983 Utah law restricting and penalizing, by civil forfeiture, those who distribute "indecent" (but not obscene) material on cable television. This is the fourth time Utah or one of its political subdivisions has enacted such restrictions. Each of the previous laws, like the present statute, has been determined to be unconstitutional.[1]

1 The United States Court of Appeals for the Eleventh Circuit has affirmed a district court's finding that a Miami ordinance, raising issues similar to those here, was unconstitutional. *Cruz* v. *Ferre*, 755 F.2d 1415 (11th Cir. 1985). There are no contrary decisions.

In 1981, the Utah State Legislature passed a statute making it a crime for any cable operator in the State knowingly to distribute "indecent material" to its cable subscribers. That statute, which, among other things, banned any showing of nudity on cable television, was declared unconstitutional in *Home Box Office, Inc.* v. *Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

The State chose not to appeal the *Wilkinson* case. Shortly thereafter, two Utah cities passed ordinances which again sought to ban, within their jurisdictional limits, "indecent" speech on cable television. The first ordinance to reach the courts was declared unconstitutional in *Community Television of Utah, Inc.* v. *Roy City*, 555 F. Supp. 1164 (D. Utah 1982). No appeal was taken from that ruling. The other local ordinance was then repealed.

In 1983, the Utah Legislature passed a state-wide statute entitled the "Utah Cable Television Programming Decency Act", Utah Code Ann. §§ 76-10-1701 *et seq.* (Supp. 1986) [hereinafter "Cable Decency Act"]. The statute imposes a "forfeiture" of $1,000 ($10,000 for a second offense) on any person who, "as a continuing course of conduct," knowingly distributes "indecent material" within the State "over any cable television system or pay-for-viewing television programming." Indecent material is described as follows:

> "Indecent material" means a visual or verbal depiction, display, representation, dissemination, or verbal description of:
>
> (a) A human sexual or excretory organ or function; or
>
> (b) A state of undress so as to expose the human male or female genitals, public [*sic*] area, or buttocks, with less than a fully opaque covering, or showing of the female breast with less than a fully opaque covering of any portion below the top of the nipple; or

> (c) An ultimate sexual act, normal or perverted, actual or simulated; or
>
> (d) Masturbation
>
> which the average person applying contemporary community standards for cable television or pay-for-viewing television programming would find is presented in a patently offensive way for the time, place, manner and context in which the material is presented.

(J.S. App. 95a)[2] No standards are offered as to the meaning of any of these elements. Under its terms, the statute may be enforced by the Attorney General, any of the twenty-nine county attorneys and any of the more than 220 city attorneys.

After the Utah Legislature passed the Act, Governor Scott M. Matheson vetoed the legislation. In his veto message the Governor asked:

> What justification is there for curtailing the basic freedom of all cable TV subscribers in Utah to see what they choose?
>
> One answer is that some wish to prevent everyone from seeing that which they find personally offensive. This cannot justify the severe and constitutionally questionable restrictions which SB 309 would produce. In a free society, a majority does not have the right to police their neighbors' viewing preferences based on a standard no more substantial than mere distaste.[3]

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2 References to "J.S. App. ____" are to appropriate pages of the Appendix to the Jurisdictional Statement. References to "J.S. ____" are to appropriate pages of the Jurisdictional Statement itself.

3 Veto Letter from Governor Scott M. Matheson to Lt. Governor David S. Monson, March 30, 1983 at 2-3 [hereinafter "Governor's Veto Message"]. In a subsequent referendum, the Utah electorate disapproved a criminal indecency statute. Certification of the Board of State Canvassers, December 14, 1984.

The broader constitutional questions aside, the Governor concluded that the definition of "indecent material" was "not the least bit predictable" and would have "the inevitable effect" of eliminating quality cable programming "simply because cable casters will not risk the uncertainties of the statute's enforcement and application." (Governor's Veto Message at 1-2) After receipt of the Governor's message, the Legislature overrode his veto.

This action was instituted by two groups of plaintiffs: individuals who subscribe to cable television in Utah on behalf of themselves and as representatives of a plaintiff class ("subscriber plaintiffs") and Utah cable system operators ("cable distributor plaintiffs") against the Attorney General individually and as representative of a class of the more than 250 officials authorized to enforce the statute. Shortly after the litigation was commenced, Home Box Office, Inc. ("HBO"), a provider of pay channel programming, moved to and was granted leave to intervene as a plaintiff. The Attorney General agreed not to enforce the statute pending resolution of the case. (*See* Opinion of the District Court, J.S. App. 43a.)

Seven months after the litigation in this case was commenced, the Attorney General issued a letter opinion offering his view as to the interpretation of several of the statutory terms. (J.S. App. 101a-115a) Acknowledging that he could not specifically define the statute's terminology "without functioning to some extent as a legislature" (J.S. App. 109a), the Attorney General advised that he would consider a "continuous course of conduct" under the statute to mean the showing of indecent material "three times within a ninety-day period." (J.S. App. 114a) Without identifying any specific statutory basis for the distinction, the Attorney General indicated that if "indecent material" were shown between midnight and seven a.m. he would not institute an enforcement action. (J.S. App. 113a) The Attorney General did not identify what material he would consider to be "patently offensive" for the "time, place, manner and context" shown, nor did he offer any guidelines

for making such determination. Under Utah law, the Attorney General's views are not binding on any of the more than 250 county and city attorneys authorized to enforce the statute.[4]

After discovery, plaintiffs moved, and the Attorney General cross-moved, for summary judgment. (Opinion of the District Court, J.S. App. 43a) The following facts, as summarized below, were, among others, agreed to by the parties and relied upon by the district court:

—A cable television system is a non-broadcast facility consisting of a system of privately-owned coaxial cables and associated signal generation, reception and control equipment that distributes television and other programming to subscribers. The cable distributor plaintiffs operate cable systems in the State of Utah and provide programming and other cable services to their subscribers by means of such privately-owned coaxial cables. (Undisputed Facts, Nos. 4, 9)[5]

—Cable television service, such as that provided by the cable distributor plaintiffs, is legally available only on the premises of persons who choose to subscribe to this service and agree to maintain a physical connection between their television receivers and a cable television system. Only television receivers that are physically connected to a cable television system are capable of receiving cable programming. (Undisputed Facts, Nos. 10, 11)

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4 Under Utah Law, the Attorney General has no authority to bind or supervise city attorneys, nor the power to bind or to mandate the enforcement policies of county attorneys. *See* Utah Code Ann. § 67-5-1 (1978).

5 Citations to "Undisputed Facts" are to the "Statement of the Undisputed Facts" set forth in "Plaintiffs' Joint Memorandum in Support of Motion for Summary Judgment" filed with the district court. The undisputed facts set forth were agreed to by defendant below as reflected in "Defendants' Response to Plaintiffs' Statement of Undisputed Facts" set forth in "Defendants' Amended Memorandum in Opposition to Plaintiffs' Joint Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment" also filed with the district court.

—The primary cable service offered to subscribers by cable distributor plaintiffs and other cable systems is called basic cable service. The basic cable service includes retransmissions of local television broadcast channels plus additional television broadcast channels imported from distant cities (*e.g.*, WTBS-Atlanta, WGN-Chicago, KWGN-Denver), plus special just-for-cable channels (*e.g.*, ESPN, CNN, C-Span). (Undisputed Facts, No. 12)

—Plaintiff HBO is engaged in the business of acquiring rights to, and producing, programming that it distributes to local cable system operators, including the cable distributor plaintiffs. In contrast to basic cable service, programming such as that offered by HBO (which includes recently released, feature-length motion picture films, special entertainment programming and sports events) and other pay television program services (*e.g.*, Showtime, The Movie Channel and The Disney Channel) is offered by cable systems (including cable distributor plaintiffs) only to those subscribers who choose to subscribe to this specific programming and to pay a monthly subscription fee in addition to the fee paid for basic cable service. Such services are distributed by satellite throughout the nation. Each pay television program service offered by the cable distributor plaintiffs and other cable system operators is offered over a separate channel and cable subscribers may choose to receive or not to receive any or all of these program services. (Undisputed Facts, Nos. 6, 13-15)[6]

—Cable subscribers in Utah may obtain, at moderate cost, a key-operated "lockbox" that enables subscribers to render their sets incapable of receiving any particular channel. (Undisputed Facts, No. 17)[7]

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6 *See generally Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984).

7 Information regarding the specific nature of cable programming is generally available to cable subscribers through such sources as daily news-

—Subscriber plaintiffs are adult residents of the State of Utah each of whom subscribes to a cable television service in his or her home in Utah, and each of whom receives and wishes to continue to receive cable programming which is not "obscene" but which might be considered "indecent material" as defined by the Utah Cable Decency Act. (Undisputed Facts, No. 5)[8]

—The definition of "indecent material" contained in the Utah Cable Decency Act encompasses expression that is not obscene under the test for obscenity articulated by this Court in *Miller* v. *California*, 413 U.S. 15 (1973). (Undisputed Facts, No. 2)

While the cross-motions for summary judgment in this case were *sub judice* before the district court, Congress passed the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521, *et seq.* (Supp. III 1985) ("Cable Policy Act"), the "first federal statute to establish a comprehensive regulatory scheme for the cable industry." (Opinion of the District Court, J.S. App. 46a-47a) *See generally* Cable Policy Act § 601, 47 U.S.C. § 521. Section 624(f) of the Cable Policy Act provides that no federal, state or local government may "impose requirements regarding the provision or *content* of cable services, except as *expressly provided* in this subchapter." 47 U.S.C. § 544(f) (emphasis added) In this regard the Cable Policy Act recognizes that

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papers or TV Guide. In addition, pay cable services (including HBO) distribute their own programming guides that describe the content of the programming offered and alert potential viewers to programming that some may find offensive. *See Cruz* v. *Ferre*, *supra*, 755 F.2d at 1419.

8 By order entered on October 12, 1983 the district court certified a plaintiff class of all adult persons residing in the State of Utah who currently receive or wish to receive, or who currently do not receive and wish to receive, in their homes in Utah, communications which might fall within the Act's definition of "indecent material" but are not obscene. By order entered February 23, 1984, the district court certified a defendant class composed of all state, county and city officials empowered to enforce the statute.

states may continue to regulate unprotected speech ("libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws," Cable Policy Act § 638, 47 U.S.C. § 558), but that "cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or any other channel obtained under section 612 [providing for use by educational groups and entities other than cable operators]." *Id.*

On April 10, 1985, the district court (Anderson, J.) issued its 50-page opinion granting summary judgment to plaintiffs. The court held that the Utah Cable Decency Act was unconstitutionally vague and overbroad and that it was, as well, preempted by the Cable Policy Act. Shortly thereafter, plaintiffs moved for an award of attorneys' fees pursuant to 42 U.S.C. § 1988 (1982). Finding that plaintiffs were clearly the prevailing parties in the case and that no "special circumstances" existed so as to justify the denial of an award, the court granted plaintiffs' motion and included an award of reasonable attorneys' fees in the judgment. (J.S. App. 85a) The district court deferred determination of the exact amount to be awarded plaintiffs pending final resolution of any appeals in the case.

On appeal to the United States Court of Appeals for the Tenth Circuit, the Court affirmed the district court's judgment "on the basis of the reasons stated in the [district court's] opinion." (J.S. App. 5a) Judge Baldock filed a concurring opinion, concluding, *inter alia*, that the Utah Cable Decency Act was unconstitutionally vague and overbroad as drafted. (J.S. App. 39a-40a)

SUMMARY OF ARGUMENT

While appellant urges that this case calls upon the Court to determine "whether the First Amendment denies government any power" to restrict the public dissemination of "indecent" material on cable television and whether a "nuisance rationale," as articulated in *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 744 (1978), may support such legislation (J.S. (i)), the statute at issue and the judgment below simply do not require or justify consideration of those questions. To be sure, the courts below, like every other court that has considered the issue, concluded that the *Pacifica* decision, forged in the context of Federal Communications Commission ("FCC") review of programs presented by a government-licensed radio broadcaster, does not render constitutional a statute that seeks to restrict the speech of cablecasters. Cable television, however, is not subject to licensing by the FCC, is subscribed to by viewers precisely in order to obtain a greater variety of programming than is available from governmentally licensed broadcasters and is a medium whose defining characteristic is that it, unlike the broadcast media, can offer a literally infinite variety of programming choice. It thus defies both logic and precedent to conclude that the medium of cable television should be relegated to the lesser level of protection afforded to broadcasters in *Pacifica* when broadcasters are afforded that limited protection only because of the special characteristics of broadcasting.

But the statute at issue here does not even squarely pose that issue because it suffers from a more commonplace, but still constitutionally fatal, flaw. Regardless of the scope of *Pacifica*, the Utah statute is terminally vague. It offers no guidance as to applicable standards in an area where precision of regulation is required, a fact tacitly conceded by the Utah Attorney General's belated, non-binding and ultimately ineffective effort to provide some of the standards the statute itself lacks. As the Governor of Utah concluded in vetoing the legislation, the statutory definition of "indecent material" is "not the least bit predictable." Punitive fines or "forfeiture" may not be premised on such a foundation. This legislation has

been found unconstitutional by each of the four federal judges who has considered it and similar legislation has been struck down by the federal district and circuit courts in the Eleventh Circuit.

Further, the statute purports to punish speech when regulation of such speech is preempted by federal statute and for this reason as well the decision below should be affirmed.

No substantial question warranting plenary review need be resolved to dispose of this appeal.

ARGUMENT

THE ISSUES DISPOSITIVE OF THIS CASE DO NOT WARRANT PLENARY CONSIDERATION BY THIS COURT

A. THE UTAH CABLE DECENCY ACT IS VAGUE AND STANDARDLESS ON ITS FACE

Whatever else may be said of the Utah Cable Decency Act, the one thing that is clear is that it is woefully unclear. In an area of constitutional inquiry that demands exacting precision,[9] the statute is a textbook example of a law that fails adequately to describe that which it seeks to proscribe. *See Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Baggett* v. *Bullitt*, 377 U.S. 360, 371-73 (1964).

Judge Anderson held and the Court of Appeals unanimously agreed that this was one of several vices of the statute. In fact it was a basis of Judge Baldock's separate concurring opinion:

> Defining indecency with express reference to the "time, place, manner and context in which the material is presented," without more, would cause people of common intelligence to guess at the meaning of indecency and differ as to the law's application. *Connally* v. *General*

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9 *See Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 682 (1968); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

> *Construction Co.*, 269 U.S. 385, 391 (1926). This uncertain meaning does not provide fair notice of what is proscribed, could result in arbitrary enforcement and could deter protected expression. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). For these reasons I am compelled to agree with the result reached by the district court.

(J.S. App. 39a-40a; citation omitted)

The Attorney General's opinion is perhaps the best illustration of the statute's vagueness and of why, therefore, this case does not warrant plenary review. Asked his view, for example, as to the time of day when indecent programming could be shown, the Attorney General responded:

> In answering this question, I hasten to state the obvious: No public lawyer or judge can specify the precise hours of each 24-hour period when indecency may be lawfully shown under the Act without functioning to some extent as a legislature. This is obvious because the Legislature simply did not specify the precise hours in the Act.

(J.S. App. 109a-110a)

Nonetheless, the Attorney General pressed forward. Turning to this Court's decision in *FCC* v. *Pacifica Foundation*, *supra*, he noted Justice Powell's observation, in his concurring opinion, that the FCC's actions in that case did not prevent the broadcast of the monologue at issue "during late evening hours." (J.S. App. 111a) The Attorney General acknowledged that any specification of late evening hours "must contain an element of arbitrariness." (J.S. App. 113a) Inexplicably, however, he then concluded that, in his view, programming containing indecent material could safely be shown between the hours of midnight and seven a.m., a peculiar interpretation of "late evening," even if one were to ignore the admitted arbitrariness of the process in the first place.[10]

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10 The Attorney General was also asked his view as to what constituted a "continuous course of conduct." (J.S. App. 113a) Noting that neither the

Its acknowledged "arbitrariness" aside, the very need for the Attorney General's opinion reflects a recognition of the total absence of standards in the statute. Consider the cable operator who consults with his counsel to determine whether and when he might disseminate the movie "Carnal Knowledge," one which contains occasional scenes of nudity and which has been held not to be obscene by this Court. *Jenkins* v. *Georgia*, 418 U.S. 153 (1974). "Carnal Knowledge" was, despite its inclusion of scenes which this Court characterized as involving "sexual conduct including 'ultimate sexual acts,' " 418 U.S. at 161, held to lack the "public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain" which the Court in *Miller* v. *California, supra*, 413 U.S. at 35, had held was an essential ingredient of obscene material. Utah's statute, however, bars not obscenity but indecency; it deliberately does *not* require the "public portrayal of hard core sexual conduct for its own sake" which *Miller* requires.[11] It thus leaves those who provide cable programming to guess as to the likely reaction of each of the more than 250 enforcing officers—and the juries they might empanel—as to whether the otherwise protected depictions in "Carnal Knowledge" comport with contemporary community standards for cable television in Utah, let alone at what time of day the showing of these scenes could be offered so as not to be "patently offensive for the time, place, manner and context" in which they were offered.

The standardlessness of the statute is particularly chilling with respect to efforts to plan nationwide programming such

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case law nor the legislative history helped in determining "the frequency necessary to constitute a continuous course of conduct," the Attorney General suggested that if a cable system operator presented indecent material "at least three times within a ninety-day period," that would, in his view, constitute a "continuous course of conduct" for enforcement purposes. (J.S. App. 114a)

11 Utah has enacted an obscenity statute that comports with the standards set forth in *Miller*. Utah Code Ann. §§ 76-10-1201 to -1229 (1978 & Supp. 1983). *See Piepenburg* v. *Cutler*, 507 F. Supp. 1105 (D. Utah 1980), *aff'd*, 649 F.2d 783 (10th Cir. 1981).

as that provided by HBO. The net effect of Utah's law, if sustained, could be to burden national entities like HBO with choosing between reducing all their programming to that which is "safe" under Utah law or excluding Utah from their programming altogether. *See Capital Cities Cable, Inc.* v. *Crisp, supra*, 467 U.S. at 707-08.

It was the statute's vagueness, among other problems, that led Governor Matheson to veto the bill. In his message to the Legislature Governor Matheson concluded:

> The heart of S.B. 309 is the definition of indecent material, which is described in very general terms. What will be labeled "indecent," under this definition, is not the least bit predictable, but will depend entirely upon a case by case determination by separate juries in separate localities for each separate piece of challenged programming. With respect to the one piece of programming, not only could different results be reached in different areas, but, different results could be reached in the same area depending upon the time of day the program is aired. And the result, with respect to any one movie or program, will furnish no guidance as to what will happen to some other program when it is challenged.
>
> This lack of predictability seems designed to force cable casters to eliminate any programming that could, under any possible circumstances, be found to be "indecent." In my view, the inevitable effect would be the withdrawal from Utah cable TV of many first-run movies and other similar programming simply because cable casters will not risk the uncertainties of the statute's enforcement and application. The sort of material withdrawn could include movies such as the Academy Award winning movie *Kramer vs. Kramer*, which could be found indecent under S.B. 309. The same may be said of other similar worthwhile films.

Governor's Veto Message at 1-2.

The Attorney General's effort, through his opinion, to assuage concerns about the vagueness of the statute offers little solace—and not a bit of predictability—with respect to the statutory scope. According to his opinion:

> [The statute] does not aim to, and will not, prevent Utahns from viewing quality movies like *Kramer vs. Kramer* on the basis of the tastefully—or even distastefully—done scene or two which may offend some viewers.

(J.S. App. 125a) One may properly ask: Why? What statutory provision offers such protection? What is the protection it offers and how can it be applied to other possible programming? What is the standard that renders *Kramer vs. Kramer* nonactionable?[12] As this Court has held, even "[w]ell-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." *Baggett v. Bullitt, supra*, at 373.

The district court concluded that the statute was impermissibly vague, as did every member of the panel below. The

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12 Despite what the Jurisdictional Statement implies, the so-called "construction" suggested in the Attorney General's letter opining on the statute is not, under Utah law, binding on any official empowered to enforce it, as the text of the opinion itself makes clear. Nor does appellant cite any Utah authority for the proposition that the Attorney General's opinion binds any enforcement authority let alone each of the officers empowered to enforce the statute. *See* n.4, *supra*.

Indeed, Morality in Media, *amicus curiae* below, contended that the Attorney General lacked the authority to adopt the midnight to seven a.m. limitation even with respect to the enforcement policies of his own office, let alone to bind county or city attorneys to his views. Brief *Amicus Curiae* of Morality in Media, Inc., submitted to the United States Court of Appeals for the Tenth Circuit at 45-47.

The fact that more than 250 state, county and local officials are separately empowered to enforce the statute illustrates the potential havoc it could wreak and rebuts the suggestion in the Jurisdictional Statement that the statute here is just like the statute that empowered the Federal Communications Commission—a single administrative agency—to issue the declaratory ruling at issue in *FCC* v. *Pacifica Foundation, supra*. (Compare J.S. 21-22.) The inapplicability of *Pacifica* to the medium of cable television is discussed in Part B, *infra*.

Governor of Utah has eloquently articulated the statute's incurable lack of ascertainable standards of conduct. The Attorney General's opinion highlights the fact that the statute fails to give fair notice of what speech it seeks to prohibit. This issue alone is dispositive of this appeal and for this reason the appeal does not warrant this Court's plenary consideration.

B. THE UTAH CABLE DECENCY ACT IS, IN ANY EVENT, AN UNCONSTITUTIONAL RESTRICTION OF SPEECH

1. The Statute Impermissibly Restricts Speech Protected By the First Amendment

The vagueness of the statute aside, the ruling of the Court of Appeals should be affirmed because the statute is a direct and impermissible restriction of constitutionally protected speech. The issue has been addressed in four federal district court decisions,[13] by the Court of Appeals for the Tenth Circuit in this case and by the Court of Appeals for the Eleventh Circuit in *Cruz* v. *Ferre*, 755 F.2d 1415 (11th Cir. 1985). Each concluded that there is no basis in law for abandoning the standards so carefully articulated by this Court in *Miller* v. *California*, *supra*. Each concluded that to abandon *Miller* in the context of a medium the very essence of which is individual choice is particularly offensive to First Amendment principles. Each rejected the argument so heavily relied on by appellant here that this Court's decision in *FCC* v. *Pacifica Foundation*, *supra*, can be read to authorize such a sweeping rejection of long-standing precedent.

In *Pacifica* this Court considered the question of whether the Federal Communications Commission constitutionally could issue a declaratory order sanctioning a radio licensee for

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13 *See Cruz* v. *Ferre*, 571 F. Supp. 125 (S.D. Fla. 1983); *Community Television of Utah, Inc.* v. *Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc.* v. *Wilkinson*, 531 F. Supp. 987 (D. Utah 1982); and the district court's opinion in this case (J.S. App. 41a).

broadcasting an indecent comedy monologue at 2 o'clock in the afternoon. Emphasizing the narrowness of its holding (438 U.S. at 750), the Court concluded that the Commission's action was constitutionally permissible given the unique characteristics of the broadcast medium. *Pacifica* does not provide support for such far-reaching restrictions on First Amendment rights as those adopted by the Utah legislature. Indeed the "unique" characteristics of broadcasting identified by this Court in *Pacifica* find no parallel in the medium of cable television.

Citing to its decision in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), the Court in *Pacifica* stressed that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *FCC* v. *Pacifica Foundation, supra*, 438 U.S. at 748. The analytical foundation articulated by this Court for distinctions between broadcasters and other speakers was grounded in the fact that broadcasters make use of the scarce spectrum of public airwaves. *Red Lion Broadcasting Co.* v. *FCC, supra*. The same cannot be said of cable. *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 44-45 (D.C. Cir.) (*per curiam*), *cert. denied*, 434 U.S. 829 (1977).

Nonetheless, appellant ignores the fundamental distinctions between cable and broadcasting and urges, instead, that this Court's decision in *Pacifica* sanctions the sweeping regulation of the content of cable programming because cable, in appellant's view, is "pervasive." Passing the anomaly that such a theory proffers—*i.e.*, the more popular a medium is, the less constitutional protection it should receive—the argument distorts this Court's deliberately narrow ruling in *Pacifica*.

Cable television is, by its very nature, far less intrusive and uncontrollable than broadcasting. Broadcast programming is disseminated through the airwaves to be received, watched or heard by anyone at no cost. As one district court noted, broadcasting quite literally meets the definition of pervasiveness: it is "ever-present." *Community Television of Utah, Inc.*

v. *Roy City, supra*, 555 F. Supp. at 1169.[14] In contrast, cable television signals are sent through a system of privately-owned coaxial cables directly to only those television receivers that are physically connected to the system. As the Eleventh Circuit noted in *Cruz* v. *Ferre, supra*, "[o]ne of the keys to the very existence of cable television is the fact that cable programming is available only to those who have the cable attached to their television sets." 755 F.2d at 1420 (footnote omitted). Describing the various tiers of choice that face every cable subscriber, the court continued:

> The Cablevision subscriber must affirmatively elect to have cable service come into his home. Additionally, the subscriber must make the additional affirmative decision whether to purchase any "extra" programming services, such as HBO. The subscriber must make a monthly decision whether to continue to subscribe to cable, and if dissatisfied with the cable service, he may cancel his subscription. The Supreme Court's reference to "a nuisance rationale," [in *Pacifica*], *id.* at 750, 98 S. Ct. at 3041, is not applicable to the Cablevision system, where there is no possibility that a non-cable subscriber will be confronted with materials carried only on cable.

Id. In short, choice is what cable is all about. That is the essence and the attraction of the medium. To suggest that because many Utah citizens have chosen to invite cable into their homes makes it "pervasive" and hence subject to regulation on the basis of this Court's decision in *Pacifica* ignores not only the caveats contained in *Pacifica* itself but reality itself.[15]

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14 The facts in *Pacifica* illustrate that one literally cannot get away from radio. Radio receivers are as portable as they are inescapable. The same can hardly be said of cable.

15 In his concurring opinion below, Judge Baldock concluded that even if this Court's decision in *Pacifica* could constitutionally be applied to the medium of cable programming, the Utah Cable Decency Act is unacceptable "because it is complete prohibition rather than regulation." (J.S. App. 39a)

The second interest identified by this Court in *Pacifica* as support for the FCC's action there was the unique accessibility of broadcast programs to children. Courts that have considered the issue raised here have recognized that government has a substantial interest in protecting the welfare of children. *Cruz* v. *Ferre, supra*, 755 F.2d at 1420; Opinion of the District Court, J.S. App. 72a. But those courts have, as well, rejected the sweeping conclusion urged by appellant that the interest in protecting children can justify the ban of indecent speech on cable television.

In sharp contrast to cases cited by appellant (*see, e.g., Bethel School District No. 403* v. *Fraser*, 106 S. Ct. 3159 (1986); *Board of Education* v. *Pico*, 457 U.S. 853 (1982); *Ginsberg* v. *New York*, 390 U.S. 629 (1968)),[16] the inevitable effect of the Utah Cable Decency Act is to "reduce the adult population [of Utah] to [watching] only what is fit for children," *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957). To suggest that this Court's decision in *Pacifica* permits such a result ignores this Court's recent and express admonitions that *Pacifica* is not to be so broadly construed and ignores again the fundamental distinctions between broadcast television and cable television. *See Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *see also Cruz* v. *Ferre, supra*, 755 F.2d at 1421.[17]

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16 Each of the cases cited allowed restrictions on access of material to children without substantially burdening, let alone barring, consumption by adults. Here, in the asserted interest of protecting children, adults who go to sleep before midnight are, even under the Attorney General's view of the statute, wholly denied access to non-obscene material which may be of substantial literary or artistic merit and which, with respect to original HBO programming, for example, may be wholly unavailable through another source. *Compare FCC* v. *Pacifica Foundation, supra*, 438 U.S. at 750 n.28.

17 Apart from the cases involving statutes directed narrowly at the protection of children (discussed in text), appellant also asserts that the *Pacifica* rationale has been applied to sustain regulation in other contexts, citing to *City of Renton* v. *Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986) and *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (J.S. 19 n.35). In each of these cases, however, the Court's decision turned on the fact that the regulation was directed not at speech, but at collateral *conduct*. No such claim can be made here.

The very nature of the cable medium makes it less suitable to government regulation than broadcast television. While it may be difficult in today's society to imagine a home without television, each parent (and non-parent) has the choice to purchase cable or not, to limit the purchase of additional services to such offerings as The Disney Channel, to purchase the full range of services, including HBO, or to cancel at any time. In addition, every cable operator in Utah is required under federal law to provide at modest cost a parental "lock-box"—a device capable of preventing access to cable channels —to any subscriber who wants one. Cable Policy Act § 624(d), 47 U.S.C. § 544(d). *See Cruz* v. *Ferre, supra*.

It was just these factors that led the Eleventh Circuit to hold in *Cruz* v. *Ferre*:

> This interest [in protecting children] is significantly weaker in the context of cable television [than in the context of broadcast television] because parental manageability of cable television greatly exceeds the ability to manage the broadcast media.

755 F.2d at 1420.

In *Bolger* v. *Youngs Drug Products Corp., supra*, this Court rejected an attempt, nearly identical to that which is urged here, to extend the rationale of *Pacifica* to other media. There this Court struck down a federal statute prohibiting the mailing to the home of unsolicited advertisements for contraceptives notwithstanding the government's asserted interest in protecting children.

> In *FCC* v. *Pacifica Foundation*, . . . this Court did recognize that the Government's interest in protecting the young justified special treatment of an afternoon broadcast heard by adults as well as children. At the same time, the majority "emphasize[d] the narrowness of our holding," . . . explaining that broadcasting is "*uniquely* pervasive" and that it is "*uniquely*" accessible to children, even those too young to read. . . . The receipt of mail is far less intrusive and uncontrollable.

463 U.S. at 74 (emphasis in original; footnote omitted).

The district and circuit courts have uniformly concluded that the medium of cable television is "far less intrusive and uncontrollable" than broadcast television and have rejected efforts to expand this Court's decision in *Pacifica* so as to abandon the long-standing principles articulated by this Court in *Miller* v. *California*. The decision of the court below is clearly correct and does not warrant plenary review.

2. The Courts Below Properly Resolved the Case on Cross-Motions for Summary Judgment

Appellant argues to this Court that the courts below erred in ruling on appellees' claim that the Utah Cable Decency Act was unconstitutional because the statute "has never been enforced in a concrete factual situation." (J.S. (i)) Yet the Attorney General has specifically and expressly acknowledged that the courts below should not have abstained from the exercise of federal jurisdiction in this case.[18] It is somewhat unclear exactly what appellant would have proposed that the lower courts do. What he would propose that this Court do, however, is made clear in the Jurisdictional Statement:

> In its current setting, there is only one issue in this case that federal courts have the unclouded power to decide. . . . The narrow question—indeed the only question—which can and should be decided at this time is whether, under *Pacifica*, the State of Utah has *any* constitutional authority to channel the cablecasting of indecent material so as to minimize its imposition on children and unwilling adult viewers.

J.S. 26-27 (emphasis in original). Thus, in an effort to persuade this Court of the importance of the issues raised on this appeal, appellant not only asks the Court to abstract from this case the broadest constitutional issue raised by the passage of the Cable Decency Act but to disregard the other necessarily attendant issues that make clear that this statute is infirm on

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18 Brief of Appellant to the United States Court of Appeals for the Tenth Circuit at 16 n.15 ("We do not suggest in this appeal that abstention was required.").

narrower constitutional grounds. Such an argument turns Article III on its head.

Having suggested that this Court should, in essence, issue an advisory opinion as to whether this Court's decision in *Pacifica* should be applied to cable, appellant goes on to allude to case and controversy requirements, standing requirements and abstention principles while at the same time avoiding any suggestion that a case and controversy is absent here or that appellees lack standing or that the courts below should have abstained. The simple fact is that under this Court's long-standing precedents appellant cannot demonstrate that the factors that motivate federal courts to decline to exercise their jurisdiction on such grounds are present here.[19] Appellant's effort to intimate otherwise provides no basis for plenary review by this Court.

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19 Appellant argues, for example, that "[t]he courts below have acted directly contrary to numerous decisions of this Court requiring that constitutional decisions be based upon concrete controversies and real fact. . . ." (J.S. 23) Yet there is simply no dispute that the cable distributor plaintiffs, for example, intend to engage in conduct, affected with a constitutional interest, but proscribed by the Utah Cable Decency Act and that there exists a credible threat that the Act will be enforced. *See, e.g., Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 298 (1979). With respect to appellee HBO there is also no dispute that its First Amendment interests are directly affected by the Act at the very least as a result of its ongoing business relationships with cable distributors in the State of Utah. *See, e.g., Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984). In any event, as Governor Matheson recognized, the statute's chilling effect is real and substantial. Governor's Veto Message at 2. Nor is there any question but that a real factual record exists, as is reflected in the cross-motions for summary judgment.

There is also no dispute that the cable viewer plaintiffs' interest in receiving cable programming to which they have chosen to subscribe satisfies the requirement that parties "assert [their] own legal rights and interests." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). This is not a case where appellees must rely on the "overbreadth" doctrine for standing; appellees challenge the statute in their *own* right. *Compare New York* v. *Ferber*, 458 U.S. 747, 767 (1982).

Finally, appellant's suggestion that the "course adopted below" impinges upon "the proper allocation of state and federal authority" so as to raise abstention concerns (J.S. at 24-25), ignores this Court's repeated cautions that abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it," *County of*

C. THE UTAH CABLE DECENCY ACT IS PREEMPTED BY THE CABLE COMMUNICATIONS POLICY ACT OF 1984

Not only is the Act incurably vague and otherwise impermissible under the First Amendment itself, but it is beyond the power of the State of Utah under the Supremacy clause. The courts below correctly determined that with the passage of the Cable Communications Policy Act of 1984, the efforts of the State of Utah to control the content of cable programming have been preempted by Congress. This issue alone is dispositive of this litigation and demonstrates why this case is not an appropriate vehicle for considering the broad constitutional questions appellant urges this Court to decide.[20]

Allegheny v. *Frank Mashuda Co.*, 360 U.S. 185, 188 (1959), and the equally well-established doctrine that abstention is completely inappropriate where, as here, a state statute is challenged on the ground that it is repugnant to the First Amendment. *Zwickler* v. *Koota*, 389 U.S. 241, 252 (1967). Appellant has not and cannot show that any of the "special circumstances" that might otherwise warrant abstention are present here. As discussed in Part A, *supra*, the statute is not readily susceptible of a narrowing construction, and certainly not one which would eliminate or substantially modify the federal constitutional questions. *See, e.g., Kusper* v. *Pontikes*, 414 U.S. 51 (1973).

20 Appellant also raises an issue unrelated to the constitutional issues he seeks to present for review by this Court, challenging the award of attorneys' fees under 42 U.S.C. § 1988 (1982). This issue is not itself an appropriate one for appeal under 28 U.S.C. § 1254(2) (1982). Nor is it an issue appropriate for review in the exercise of this Court's discretion. *See Davis* v. *Scherer*, 468 U.S. 183, 189-90 n.7 (1984). A prevailing plaintiff in a civil rights case should ordinarily recover attorneys' fees " 'unless special circumstances would render such an award unjust'." *Kentucky* v. *Graham*, 473 U.S. 159, 164 (1985); *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983), *quoting* S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976) ("Senate Report"), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5912, *quoting Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (*per curiam*). Appellant argues that the financial status of a plaintiff and the "good faith" of a defendant are sufficient "special circumstances" so as to justify denial of a fee award. To our knowledge, no circuit court has ever agreed.

(footnote continued on following page)

The Cable Policy Act provides that any state or local act or regulation "which is inconsistent with the provisions of [the Act] shall be deemed to be preempted and superseded" (Cable Policy Act § 636(c), 47 U.S.C. § 556(c)). As the district court correctly found, the Act makes clear that the federal government is to exercise "exclusive" regulatory power over program content in all but a few limited areas. (*Id.*) Section 624(f)(1) of the Act states:

> Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or con-

---

The courts of appeals have consistently rejected appellant's argument that the ability to pay attorneys' fees is relevant to the determination of whether a prevailing plaintiff seeking injunctive relief is entitled to an award of fees under section 1988. *E.g., American Booksellers Ass'n* v. *Commonwealth of Virginia*, 792 F.2d 1261, 1266-67 (4th Cir. 1986); Opinion of the Court of Appeals, J.S. App. 6a; *Duncan* v. *Poythress*, 777 F.2d 1508, 1511 (11th Cir. 1985), *cert. denied sub nom.*, 106 S. Ct. 1659 (1986); *Ackerley Communications, Inc.* v. *City of Salem*, 752 F.2d 1394, 1397 (9th Cir.), *cert. denied*, 105 S. Ct. 3503 (1985); *Milwe* v. *Cavuoto*, 653 F.2d 80, 83 (2d Cir. 1981); *International Oceanic Enterprises, Inc.* v. *Menton*, 614 F.2d 502, 503 (5th Cir. 1980). Appellant's impermissibly expansive reading of *Zarcone* v. *Perry*, 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1978), and *Wheatley* v. *Ford*, 679 F.2d 1037 (2d Cir. 1982), is misplaced, out of context and in any event irrelevant where, as here, injunctive relief rather than damages was sought. *See Zarcone* v. *Perry, supra*, 581 F.2d at 1044 (distinguishing situations involving injunctive relief). No circuit court, including the Second Circuit, has adopted the expansive extension of those opinions offered by appellant. *Cf. Milwe* v. *Cavuoto, supra.*

Similarly, the courts of appeals have uniformly concluded that the alleged "good faith" of a defendant in pursuing practices or enacting policies later held to be unconstitutional is entirely irrelevant to the question of whether fees should be awarded to a prevailing plaintiff under section 1988. *E.g., American Booksellers Ass'n* v. *Commonwealth of Virginia, supra*, 792 F.2d at 1266-67; *Martin* v. *Heckler*, 773 F.2d 1145, 1151 (11th Cir. 1985); *International Oceanic Enterprises, Inc.* v. *Menton, supra*, 614 F.2d at 504; *In re Kansas Congressional Districts Reapportionment Cases*, 745 F.2d 610 (10th Cir. 1984). Appellant cites no case law to the contrary and we are aware of none.

> tent of cable services, except as expressly provided in this subchapter.

47 U.S.C. § 544(f)(1). Because there is no express provision in the Cable Policy Act authorizing the states to regulate that which the State of Utah has regulated here, by the terms of the Cable Policy Act itself the Utah Cable Decency Act is preempted.

At the outset, it simply cannot be disputed that to the extent that the Utah Act regulates leased channels, public channels, educational channels and governmental channels (all of which it clearly does), the statute is flatly and expressly superseded by the Cable Policy Act. Sections 611(e) and 612(c) of the Act prohibit cable operators from asserting any editorial control over these so-called "special access" channels and section 638 forbids civil actions against cable operators concerning the content of such programming. 47 U.S.C. §§ 531(e), 532(c) and 558. (Opinion of the District Court, J.S. App. 47a-49a; Concurring Opinion of Baldock, J., J.S. App. 9a) The courts below have concluded that the Utah Cable Decency Act has been explicitly preempted in this regard and the Jurisdictional Statement does not appear to challenge this. Thus the Act is defective on this basis alone.

Similarly, the *effect* of allowing local regulation of so inchoate a concept of indecency has been plainly recognized by this Court in a pre-Cable Policy Act context. As this Court recognized in *Capital Cities Cable, Inc.* v. *Crisp, supra*, the effect of allowing a single state, let alone more than 200 jurisdictions within a state, to enforce a content restriction may be to force the elimination of such cable services altogether (467 U.S. at 707-08) or, perhaps, to alter the national presentation to conform to the Utah standard.[21] "As a consequence, the public may well be deprived of the wide variety of programming

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21 The very imprecision (and potential inclusiveness) of indecency distinguishes it from the more rigorous and narrow context of obscenity, magnifying the impact of differing local standards in the indecency context.

options that cable systems make possible." *Id.* at 708. The federal cable legislation, expressly designed to "establish a national policy concerning cable communications," to "establish guidelines for the exercise of Federal, State and local authorities with respect to the regulation of cable systems" and to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public" does not support such a result. (Cable Policy Act § 601(1), (3), (4), 47 U.S.C. § 521(1), (3), (4))

The Federal law exempts from preemption civil or criminal liability for "libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws."[22] Appellant argued below that the phrase "other similar laws" reflected Congress' intention to permit states to regulate speech that is "indecent" but not obscene. But, as the district court correctly observed, "[t]he list in § 638 [47 U.S.C. § 558] is a classic collection of laws regulating expression which the Supreme Court has deemed unprotected by the First Amendment" and concluded that "the plain purpose of § 638 is to preserve federal, state and local regulation of *unprotected* expression in the areas noted." (J.S. App. 50a-51a; emphasis supplied) No court has ever held that indecent expression is unprotected by the First Amendment. *See FCC* v. *Pacifica Foundation, supra.* In fact, the legislative history of the Cable Policy Act confirms that Congress was acutely aware of the fact that indecent speech was not unprotected speech and, as

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22 The provision in question provides:

> Nothing in this subchapter [V-A] shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 532 [Act § 612] of this title or under similar arrangements.

Cable Policy Act § 638, 47 U.S.C. § 558.

such, could not be regulated by the states. (H.R. Rep. No. 934, 98th Cong., 2d Sess. 69-70 (1984) ("House Report"), *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4706-07).[23] While Congress recognized the potential for change in constitutional law, including the law relating to indecency, its focus was on speech which, like "obscenity" or "fighting words," might ultimately be held to be "*unentitled* to constitutional protection." House Report at 95, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 4732 (emphasis supplied). No one has ever suggested that by characterizing non-obscene speech as "indecent," it thereby becomes wholly "unentitled" to constitutional protection.[24]

In essence, to argue that the Cable Decency Act has not been preempted by Congress is to argue, in different words, that this Court's decision in *Pacifica* held that speech that is "indecent" but not obscene is wholly unprotected by the First Amendment. As Congress well understood, this Court's decision in *Pacifica* stands for nothing of the kind. As such, the Utah Cable Decency Act is plainly preempted.

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23 That Congress intended to preempt the very sort of legislation enacted by Utah is also reflected in the provisions of the Cable Policy Act that require cable operators to provide "lockboxes" to subscribers who request them. (Cable Policy Act § 624(d) 47 U.S.C. § 544(d)) It provided alternative means—short of the censorship Utah would impose—to deal with the concern that apparently animated the Utah legislature, expressly referring to indecency in this context.

24 "Obscenity . . . simply is not constitutionally protected speech. By contrast, indecency is not, *per se*, without constitutional protection." C. Blakeley and A. Eisgrau, *Regulatory Redux: The FCC's Shifting Approach Towards Obscenity and Indecency*, 4 Communications Lawyer 6, 7 (Fall 1986).

CONCLUSION

Appellees respectfully submit that the questions necessary to the disposition of this case are so unsubstantial as not to need further argument, and appellees respectfully move the Court to affirm the judgment entered by the United States Court of Appeals for the Tenth Circuit.

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No. 86-1125

In The
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David L. Wilkinson
Attorney General of the State of Utah,
Appellant,

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Appellees.

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On Appeal From The United States
Court of Appeals For The Tenth Circuit

BRIEF OF AMICI CURIAE, THE STATES OF

Arizona	Missouri	Pennsylvania
Kansas	New Hampshire	South Carolina
Mississippi	New Mexico	Washington
		West Virginia

IN SUPPORT OF APPELLANT'S
JURISDICTIONAL STATEMENT

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INTEREST OF THE AMICI CURIAE

The transmission of sexually explicit programs by cable television into homes where cable television is desired but sexually explicit programming is not has become, in recent year, a matter of grave concern to many states. Laws enacted by several state and local authorities to respond to this problem have been challenged in federal courts by cable system and cable channel operators claiming constitutional immunity from any regulation of nonobscene sexually explicit programming.[1]

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1 See, e.g., Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982); Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164 (D. Utah 1982); Cruz v. Ferre (I), 571 F. Supp. 125 (S.D. Fla. 1983); Cruz v. Ferre (II), 755 F. 2d 1415 (11th Cir. (1985) (affirming Cruz (I); Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1985) (Wilkinson I); Jones v. Wilkinson, 800

(Footnote 1 continued on next page)

This litigation culminated recently with the split decision of the United State Court of Appeals for the Tenth In that per curiam opinion, two judges summarily affirmed (for "the reasons stated in the [district court's] opinion," 800 F. 2d at 891) the district court's conclusion that the obscenity test of Miller v. California, 413 U.S. 15 (1973) defines the absolute limit of permissible regulation of sexually explicit programming on cable television, and that the principles of FCC v. Pacifica

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(Footnote 1 continued from previous page) F. 2d 989 (10th Cir. 1986) (Wilkinson II). See further Midwest Video Corp. v. FCC, 571 F. 2d 1025, 1037-39 (8th Cir. 1977), aff'd, 440 U.S. 689 (1979).

2 Jones v. Wilkinson, 800 F. 2d 989 (10th Cir. 1986), aff'g. Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1985).

Foundation, 438 U.S. 726 (1978), which upheld reasonable regulation of "indecent" broadcast programming, do not apply to cable television. Under the holding of the courts below mere time, place and manner regulations designed to "channel" indecent cable television programming away from objecting cable viewers and from children are facially invalid and unconstitutional per se.

This appeal raises an urgent question of constitutional law: Does the first amendment forbid all regulation of nonobscene but "indecent" sexually explicit programming on cable television? Amici strongly urge the court to hear this case and address this question now, for the erroneous decisions and doctrine of the courts below have improperly frustrated reasonable state efforts to protect and vindicate profound public

interests including the welfare of minors, the privacy of the home, the interests of numerous cable television subscribers who object to the intrusion of sexually explicit programming at any time, on any channel, and the public policy that scarce public resources should not be exploited by profiteering cable operators in a manner that undermines the essential nature and values of the community.

I. THIS CASE RAISES SUBSTANTIAL CONSTITUTIONAL AND STATUTORY QUESTIONS

The decisions of the lower courts in this case raise fundamental questions concerning the application of the first amendment to cable television, i.e., the constitutionality of state laws regulating the time, place and manner of transmitting sexually explicit programs to the public over cable television systems.

"[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them."[3]

Reasonable regulations of indecent programing in the broadcast media have been upheld by this Court.[4] Likewise federal courts have upheld reasonable time, place and manner regulations of print publications, including "slipcover" requirements applicable to nonobscene but indecent sex magazines.[5] Also, indecent

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3 Red Lion Co. v. FCC, 395 U.S. 367, 386 (1969); see also Metro Media, Inc. v. City of San Diego, 453 U.S. 490 501 (1981); City of Los Angeles v. Preferred Communications, Inc., 106 S. Ct. 2034, 2034 (1986).

4 FCC v. Pacifica Foundation, 438 U.S. 726 (1978); see also Red Lion Broadcasting, 395 U.S. at 400-01; Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); 18 U.S.C. §1464 (1982).

5 See, e.g. Upper Midwest Booksellers

(Footnote 5 continued on next page)

telephone communications (a cable communication system) have long been prohibited by law.[6] Yet the courts below declared that no regulation of nonobscene sexually explicit programming on cable TV is constitutionally permissible.

Regrettably, in an unbroken line of cases,[7] the lower federal courts have created and enforced an absolute "either-or" rule: Either cable television programming is obscene, and can be totally restricted, or it is not obscene and cannot be regulated in any manner.

(Footnote 5 continued from previous page) Ass'n v. City of Minneapolis, 780 F.2d (8th Cir. 1985); M.S. News Co. v. Casado, 721 F.2d 1281 (10th Cir. 1983).

6 47 U.S.C. § 223 (1984); id. at § 609 (1982 & Supp III 1985).

7 See supra note 1.

Application of this doctrine reached its nadir in this case when the court of appeals summarily affirmed the summary judgment prematurely entered by the district court holding that Utah's mere "channeling" regulations embodying "time, place, manner, or context" considerations to protect a family viewing period were unconstitutional.

The issue of the first amendment standard of protection for sexually explicit cable television programming is now ripe for decision. The lower courts have had five years and six opinions in which to develop a workable constitutional solution, but they have failed.[8] The decisions of the lower courts, culminating in the decisions of the courts below, have created a constitutional conundrum by

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8 See supra note 1.

their application of a turgid, "pigeon-hole" test. Legal commentators, likewise, have analyzed the issue extensively in recent years. And while, as expected, they offer a variety of perspectives, the better analysis has concluded that reasonable time, place, and manner regulations of indecent cable television programming do not violate the first amendment.[9] Likewise, lawyers specializing

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9 See generally Hofbauer, 'Cableporn' and the First Amendment: Perspectives on Content Regulation of Cable Television, 35 **F.C.C.L.J.** 139 (1983); Riggs, Indecency on Cable: Can It Be Regulated?, 26 **Ariz L. Rev.** 269 (1984); Wardle, Cable Comes of Age: A Constitutional Analysis of the Regulation of "Indecent" Cable Television Programming, 63 **Denver U.L. Rev.** 621, 623-26 (1986); Note Indecent Programing on Cable Television and the First Amendment, 51 **Geo. Wash. L. Rev.** 254 (1983). But cf. Geller & Lampert, Cable Content Regulation and the First Amendment, 32 **Cath. U.L. Rev.** 603 (1983); Krattenmaker & Esterow, Censoring Indecent Cable Programs; the New Morality Meets the New Media, 51 **Fordham L. Rev.** 606 (1983).

in first amendment litigation have long expected this issue to "ultimately be decided by the Supreme Court." [10]

Many states and local governments have enacted laws responding to the problem of intrusive sexually explicit cable programming.[11] Until this Court

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10 Smith, Battle Intensifying Over Explicit Sex on Cable TV, N.Y,. Times, Oct. 3, 1983 at A1. col 1, and § 3, p. 22 col. 6 (emphasis added):

"Some legal experts predict that the issue of sexually explicit programming on cable television will ultimately be decided in the Supreme Court. A Miami case has already been appealed to a higher court, and a new law passed last Spring in Utah is being challenged in the Federal court.

"The resolution of whether cable is to be more like broadcasting or more like newspapers," Mr. [Floyd] Abrams, the New York lawyer, said, "will determine a good deal of the future of what our country is likely to be watching in years to come."

11 See, e.g., Cal. Gov't. Code § 53006.4 (West Supp 1984); Kan. Stat. Ann. § 12-2006 (1982); N.J. Rev. Stat. § 48:

(Footnote 11 continued on next page)

clarifies the first amendment standards the states will be hamstrung in their efforts to protect critical public interests and the cable television industry will suffer from continued regulatory efforts by states lacking clear

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(Footnote 11 continued from previous page) 5A-50 (Supp. 1983); N.Y. Exec. Law §§ 829-1, 830 (McKinney, 1982); R.I. Gen. Laws § 39-19-8 (1977), repealed by, id. (Supp. 1983); S.D. Codified Laws §§ 9-35-17, 18 (1981); Utah Code Ann. § 76-10-1229 (Supp. 1983) (invalidated in Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 986 (D. Utah 1982); Utah Code Ann. § 76-10-1701 to 1708 (Supp. 1983); and Wes. Stat. Ann. § 134.43 (Wis. Supp. 1983). See also Ariz. Rev. Stat. Ann. § 9-510 (Supp. 1983); City of Miami, Fla., Ordinance No. 9223 (Oct. 19, 1981) quoted in Cruz (II), 755 F. 2d at 1416-17; Milwaukee, Wis., Code, ch. 99-13 (12)(a)(2), repealed by Ord. No. 210 (Mar. 22, 1985); Roy City, Utah, Ordinance, Title 17, ch. 3 (1982) quoted in Roy City, 555 F. Supp. at 1173-74. See generally, Weinstein, supra note 13, at 29; Smith, supra note 10, at 22, Col. 3; Hofbauer, supra note 9, at 174-81; Wardle, supra note 9, at 627, 679 n. 332.

guidance of this Court on an issue of profound importance.

Additionally the courts below both misunderstood and misapplied the "overbreadth" and "vagueness" doctrines and prematurely struck down a state statute which is not only capable of being interpreted in a constitutional manner, but they disregarded the Utah Attorney General's guidelines which gave the statute a modest and limited application.

Finally, the lower courts improperly awarded attorneys fees to the cable companies under the authority of 42 U.S.C. §1988 (1982). It is uncontested that those defendants have substantial assets and have been able to afford to litigate aggressively the issues concerning the constitutionality of cable television indecency regulations. It is also uncontested that the Utah statute was enacted and defended in good faith.

In these circumstances the award of attorneys fees was improper under federal law perverting the congressional purpose of the statute. That statute should not be construed to provide a windfall to wealthy corporations who prevail in cases involving unsettled questions of constitutional law. For all of these reasons, this case raises substantial questions of constitutional law.

II. The Utah Statute Does Not Violate the First Amendment.

A. Reasonable Regulation of Indecent Cable Television Programming Promotes Profound State Interests

There is substantial grassroots citizen discontent today regarding the

"sexploitation" of cable television.[12] Many individuals and families who desire the educational, cultural, and entertainment benefits of cable television but who are unwilling to subject themselves or their children to the uninvited intrusion of sexually explicit programming in their homes are deprived of the benefits cable TV.[13] The state has a

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12 See generally, Smith, supra note 10, at A1, col. 1; O'Connor, Cable Displays A Growing Eagerness to Titilate, N.Y. Times, Apr. 17, 1983, § 2, at 25, col. 4; Gunther, Pay T.V. Sex: How Far Can It Go?, **T.V. Guide**, Mar. 28, 1981, at 4, 5; Waters, Cables' Blues in the Night, **Newsweek**, Aug. 24, 1981, at 48; Weinstein, Sex and Cable, **CableVision**, Feb. 11, 1985, at 29. See also Hofbauer, supra note 9, at 139-42; Wardle, supra note 9, at 623-26.

13 A New York Times article reported that two studies found, respectively, that one-fourth and one-third of the persons interviewed "said they did not subscribe to [cable television] services because they did not want

(Footnote 13 continued on next page)

genuine and growing concern in protecting the interests of citizens who are excluded from access to cable television because of unchanneled exploitive programming.

Cable television reaches directly into the home where not only may it assault unsuspecting adult viewers, but where children may be victimized by exploitive sexual programming. Protecting the well-being of children from premature and potentially damaging exposure to inappropriate sexually explicit programming is a compelling state interest

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(Footnote 13 continued from previous page) their children exposed to some of its programming." Smith, supra note 10, at C22, col. 4. Even a cable industry magazine reported that two surveys it conducted showed that approximately two-thirds of the cable viewers agreed that "adult programs should turn down the steam...." Some Like It Hot, But Won't Tell, **CableVision**, May 14, 1984, at 12.

which the Court has recognized in numerous prior decisions. See, e.g., Pacifica Foundation, 438 U.S. 726 (1978); id. at 758, 59 (Powell, J., concurring); Ginsberg v. New York, 390 U.S. 629 (1968).

Moreover, cable television systems depend upon the near-exclusive use of scarce public resources to operate. Cable operations require the use of public waves, alleys, easements, streets, and condemnation authority to lay and maintain the cables. As the Tenth Circuit noted in another case: "Government and cable operators are tied in a way that government and newspapers are not." Community Communications Co. v. City of Boulder, 660 F. 2d 1370 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982).

It is within the constitutional province of state and local governments to dedicated those resources to purposes

consistent with the character of the community and the quality of its neighborhoods. And it is likewise reasonable for such communities to require cable television companies demanding the use of those scarce public resources to provide programming that is not unfit for general family viewing at least during hours or on the channels when general family viewing is expected. See Wardle, supra note 3, at 650-56; Omega Satellite Products Co. v. City of Indianapolis, 694 F. 2d. 119, 126 (7th Cir. 1982).

Several states and municipalities already have enacted statutes embodying a wide diversity of approaches to dealing with the problem of sexually explicit cable programming.[14] In 1984, Congress also addressed the problem of unfettered

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14 See supra note 11.

exploitation of sexual programming on cable television when it enacted the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 et seq. (West Supp. 1985). In this Act Congress specifically preserved and endorsed state and local laws concerning "obscenity ... or other similar laws...."[15] And notwithstanding the confusing analysis of the courts below, 611 F. Supp. at 1101-05; 800 F. 2d

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15 47 U.S.C.A. § 558 (West Supp. 1985). In another section, Congress specifically preserved the authority of state and local cable franchisers to contractually restrict programs that are "obscene or otherwise unprotected by the United States Constitution." Id. § 544 (d)(1)(Supp. III 1985). Additionally, Congress required cable operators to provide lockboxes to customers upon request. Id. at § 544 (d) (2)(A)(West. Supp. 1985). Congress also made it a federal crime to transmit "any matter which is obscene or otherwise unprotected by the constitution" over cable television systems. Id. §559 (West. Supp. 1986).

at 990-91, the legislative history unequivocally underscores the congressional intent to preserve, not preempt, state regulations of indecent cable programming to the extent allowed under the first amendment.[16] Thus, Congress has recognized that states have profound interests in reasonably regulating sexually explicit cable programs to protect individuals, families, children and community values.

B. The Lower Courts Erred In Applying A "Pigeon-hole" Test Which Forbids All Regulation Of Nonobscene Cable Television Programming

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16 Wilkinson v. Jones, 800 F. 2d at 992-95 (Baldock, J., concurring); Wardle, supra note 9 at 686-92. This Court should decisively clarify that the C.C.P.A. does not preempt state regulation of indecent cable TV programming.

The fundamental mistake made in this case by the lower courts, and by all the lower courts which have addressed this issue, is the assumption that the narrow, strict obscenity test of Miller v. California, 413 U.S. 15 (1973), delimits the boundary of constitutionally permissible regulation of sexually explicit programming on cable television. The district court below denied that the first amendment authorizes some reasonable regulation "beyond the limits articulated in Miller." 611 F. Supp. 1109. On appeal, two judges summarily endorsed this "pigeon-hole" analysis. 800 F. 2d at 990. But Judge Baldock, in his separate concurring opinion, vigorously disagreed. He rejected the wooden suggestion that "sexually oriented material which is indecent is entitled to unlimited constitutional protection merely because

it is not obscene." 800 F. 2d 995-96 (Baldock, J., concurring). Moreover, he cited numerous precedents that demonstrate "that the Miller adult obscenity standard is not the exclusive test to be applied to the regulation of sexually oriented material." Id. at 999.

The courts below were merely perpetuating a mistake which had been made by other lower federal courts. For instance, three years earlier another federal judge invalidating an earlier Utah legislative attempt to restrict sexually explicit programming on cable television, lectured: "States may not go beyond Miller in prescribing criminal penalties for distribution of sexually oriented materials. For better or worse, Miller establishes the analytical boundary of permissible state involvement in the decision by HBO and others to offer, and

the decision by subscribers to receive particular cable TV programming...." In Home Box Office Inc. v. Wilkinson, 531 F. Supp. 987, 994-95 (D. Utah 1982).

In Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164 (D. Utah 1982), a federal judge in Utah invalidated a city ordinance attempting to restrict sexually explicit on cable television, and emphasized that it was beyond the power of state or local government "to control communication that is on the protected side of the pornographic line set forth in Miller." Id. at 1171. See also id. at 1172.

The Eleventh Circuit likewise endorsed the notion that regulation of sexually oriented material "beyond the Miller definition of obscenity" is not permissible. Cruz v. Ferre (II), 755 F. 2d 1415, 1418-22 (11th Cir. 1985).

All three of these cases were cited and relied upon by the district court in the case at bar. 611 F. Supp. at 1107, 13, 15, 16.

The "pigeon-hole" analysis that insists that sexually oriented material either is obscene, and can be totally regulated, or not obscene, and completely immune from regulation, is over simplistic and unrealistic. In numerous contexts this Court has unheld reasonable regulation of nonobscene, but sexually explicit material.[17]

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17 City of Renton v. Playtime Theatres, Inc., 106 S. Ct 925 (1986) (adult movie theatres); Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159 (1986) (indecent sexual innuendo in speech to high school students); New York v. Ferber, 459 U.S. 747 (1982) (kiddie-porn restrictions); New York State Liquor Auth v. Bellanca, 452 U.S. 714 (1981) (restrictions on topless dancing in bars); FCC v. Pacifica, 438 U.S. 726 (1978) (indecent radio broadcasts); Young v.

(Footnote 17 continued on next page)

Moreover, the line between obscene material and nonobscene material that is sexually explicit and which, under contemporary community cable-viewing standards, is patently offensive and deemed inappropriate for unrestricted transmission to the general public is not wide. Indecent material offends "for the same reason obscenity offends," Pacifica, 438 U.S. at 746 (Stevens, J., plurality opinion), only not to the same degree. Thus, the "pigeon-hole" analysis of the courts below was seriously defective.

(Footnote 17 continued from previous page) American Mini Theaters, Inc., 427 U.S. 50 (1976) (restricted zoning of "adult" theatres); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (statute authorizing Post Office to not deliver offensive mail to addressee at his request); Ginsberg v. New York, 390 U.S. 629 (1968) (prohibition of sale of "girlie magazines" to minors).

C. The Pacifica Test Applies To The Regulation Of Sexually Explicit Cable Television Programming.

In F.C.C. v. Pacific Foundation, this Court upheld a declaratory order of the FCC which reprimanded the owner of a radio station that broadcasted a nonobscene but indecent "adult" monologue one afternoon in October, 1973. An unidentified listener who had tuned into the FM broadcast while driving in his car with his young son complained to the FCC. 438 U.S. at 730. The FCC put a declaratory order in the stations license file to be considered if further incidents occurred. The District of Columbia Circuit overturned the FCC order. Pacifica Foundation v. FCC, 556 F. 2d 9 (D.C. Cir. (1977)). On appeal the Supreme Court addressed the question "whether the First Amendment denies any government any power

to restrict the public broadcast of indecent language in any circumstances." 438 U.S. 744. The Court concluded that it did not and reversed the Court of Appeals. Writing for the court, Justice Stevens noted that broadcasting has received the most limited protection under the first amendment because of its "pervasive presence in the lives of all Americans," and because "broadcasting is uniquely accessible to children." Id. at 748-50. Reasonable regulation of indecent radio communication does not violate the first amendment. The majority emphasized that the time of the broadcast, content of the program, audience, and a host of other variables relating to the context were critical factors for the first amendment analysis. Id. at 750. Justices Powell and Blackmun filed a concurring opinion to emphasize that regulations designed to

channel indecent programming away from children and to protect the home are not unconstitutional. Id. at 757-59 (Powell, J., concurring).

The district court below erroneously concluded that the Pacifica principles do not apply to cable television programming. The trial court noted that the radio broadcast in Pacifica occurred in the afternoon, but the Utah statute did not apply to afternoon programming.[18] Judge Anderson also suggested that Pacifica was somehow qualified because the decision of the court was "closely divided," 611 F. Supp. at 1110 (apparently Judge Anderson

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18 611 F. Supp. at 110, 114-15. In light of the trial court's rejection of guidelines promulgated by the state attorney general defining when sexually explicit could be transmitted on cable television without possibly violating the Utah statute, this is a rather curious basis for distinguishing Pacifica.

made an arithmatic error here), and emphasized that radio and cable television are distinguishable media. Id. at 1115. The district court concluded that the subsequent decision of the Supreme Court in Bolger v. Youngs Drug Products Corp., 463 U.S. 650 (1983) had rendered Pacifica sui generis. 611 F. Supp. at 1111.

While two judges of the Tenth Circuit endorsed this analysis, 800 F. 2d at 990, Judge Baldock properly disagreed. He emphasized that cable and broadcast television are practically indistinguishable when it comes to pervasiveness and accessibility to children, the key analytical factors underline the Pacifica doctrine. 800 F. 2d at 998-1005 (Baldock, J., concurring). Likewise, he refuted the suggestion that government of indecent cable television is unnecessary because viewers voluntarily

subscribe to the medium. Not only do broadcast TV viewers also voluntarily elect (and pay) to obtain access to that medium, but cable television programs just like broadcast television programs, are disseminated to the public in general, not just specific purchasers who select a particular movie or program. Id. at 1005. And the argument that cable television viewers have consented to indecent cable programing by subscribing to the medium "is too simplistic and is akin to the notion to one who hears an indecent broadcast has a remedy by turning it off. This notion was expressly rejected in FCC v. Pacifica . . . ." 800 F.2d at 1006.

The misguided attempt by the courts below to distinguish Pacifica merely capped an error made by other federal courts. For example, in Roy City (one of the cases relied on by District Judge

Anderson) another federal judge in Utah declared: "Pacifica, which deals with broadcasting, transmission of electro-magnetic radio waves through the publicly controlled airways, in not applicable in this case. It is irrelevant." 555 Supp. at 1169. The court reached this conclusion by contrasting (in a remarkable laundry list) some of the operating characteristics of cable television and broadcast television. Unfortunately, none of the characteristics compared had any bearing on any of the analytically significant factors identified by the Supreme Court in Pacifica. Additionally, the court in Roy City concluded that cable television, unlike broadcast TV, is not "pervasive" because that term refers to method of transmitting the program! "Literally it means ever present. It is in the air, or diffused widely. And that

since, broadcasting meets the definition. In that sense it is pervasive because its medium, the air, is pervasive. Transmission by wire is not." 555 F. Supp. at 1169. See also Cruz (I), 571 F. Supp. at 131; Cruz (II), 755 F. Supp. at 1420.

The Pacifica principles apply to cable television for precisely the same reasons the Court in that case held they apply to broadcasting. The pervasiveness of cable television in 1987 is probably greater that the pervasiveness of FM radio in 1973, when the offensive George Carlin monologue was broadcast on the Pacifica radio station. See Wardle, supra note 3, at 623-25, 50-51. "The visual impact of television, both broadcast and cable, coupled with the auditory effect, gives television more impact than the mere words or radio." Id. at 650.

The fact that patently offensive radio broadcast invaded the privacy of the home was emphasized by the Court in Pacifica. 438 U.S. at 748; id. at 759 (Powell, J., concurring). See also Carey v. Brown, 447 U.S. 455, 471 (1980) Rowan v. United States Post Office Department, 397 U.S. at 737. The nature and degree of intrusiveness into the home of cable television is virtually indistinguishable from that of broadcast television programming. Riggs, supra note 9, at 314, Wardle, supra note 9, at 650.

The accessibility of children to indiscriminate programming was another factor emphasized by the Court in Pacifica. 438 U.S. at 749-50; id. at 758-59 (Powell, J., concurring). See also Ginsberg v. New York, 390 U.S. 629, 639 (1968); Rowan, 397 U.S. at 738. The accessibility of children to television

programming is unaffected by whether the television set receives its signals by airwave or cable transmission.

As Pacifica indicated, there is a critical distinction between government attempts to ban absolutely nonobscene programming from a medium, and attempts to reasonably regulate or channel the time, place, and manner of transmitting sexually explicit programming. The Utah statute in this case merely requires that it be "channeled" considering time, place, manner, and context. The failure of the lower courts to appreciate this critical distinction was fatal to their analysis.

Finally the suggestion of the lower courts that this Court has "limit[ed] Pacifica to its facts," 611 F. Supp. at 1111, is wrong. In the case cited to support that mistake, Bolger, this Court simply noted that Pacifica did not justify

an absolute ban of all mailed contraceptive advertisements--"a far cry from the conclusion that the Pacifica approach does not apply at all to regulations of indecent cable television programming." Wardle, supra note 3, at 647. This Court has frequently applied the Pacifica doctrine in recent years--even outside the context of the broadcast media.[19]

D. The Utah Statute Is Not Facially Unconstitutional

In their haste to invalidate the Utah Cable Television Programming Decency Act,

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19 See, e.g., Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. at 3165-66 (high school speech); New York v. Ferber, 458 U.S. at 763 (Kiddie-porn); Carey v. Brown, 447 U.S. 455, 471 (1980) (residential picketing); see also, Board of Education v. Pico, 457 U.S. at 890 (Berger, C.J., dissenting) (school librariens).

the lower courts broadly misconstrued the statute. The district court interpreted the Act to "create a de facto ban of some cable material ...." 611 F. Supp. at 1111.

This misreading of the statute not only flies in the teeth of the unambiguous language of the statute, but disregards the only interpretation of the statute by a state official. See infra Part III.

Unlike prior attempts at cable regulation, the Utah statute only applies to "a continuing course of conduct" rather than isolated incidents of sexually explicit transmission. Utah Code Ann. § 76-10-1703 (Supp. 1983). Moreover, the Act is not a criminal prohibition but a civil nuisance regulation for which fines, rather than imprisonment, are the potential sanctions. Id. at § 1704. And, perhaps most importantly, the Act does not

prohibit the transmission of sexually explicit programming on cable television altogether, but only when "applying contemporary community standards for cable television" it is found to be "presented in a patently offensive way for the time, place, manner and context in which the material is presented." Id. at § 1703.

This Court has frequently upheld a reasonable time, place, and manner regulation of speech.[20]

The regulation of sexually explicit, indecent communication is not content regulation. It is a regulation of the manner of expression, like the regulation

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20 Bethel School District No. 403, 106 S. Ct. at 3159; Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 n. 17 (1982); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 75 (1981); Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981); Kovaks v. Cooper, 336 U.S. 77, 85 (1949).

of vulgarity, racial epithets, profanity, etc. See generally Riggs, supra note 3, at 273 n. 78; Wardle, supra note 3, at 663-65.

The lower courts erred in this case when they found Utah's moderate and passive scheme of time, place and manner regulations to be unconstitutional. As Judge Baldock noted, cable television offers a valuable resource to individuals and families, and the first amendment does not prohibit reasonable regulation designed to ensure that it "should be available to all who are willing to subscribe, even those who object to patently offensive indecent material being presented during family viewing hours." 800 F. 2d at 1006 (Baldock, J., concurring).

III. The Utah Statute Is Neither "Overbroad" nor "Vague."

The lower courts apparently misunderstood, as well as misapplied, the "overbreadth" doctrine. This Court has emphasized that the overbreadth doctrine is "strong medicine" and has employed it with hesitation, and then "only as a last resort." New York v. Ferber, 458 U.S. at 769; Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

The lower courts erroneous application of the overbreadth doctrine in this case resulted from two fatal mistakes. First, the courts misunderstood the first amendment, believing that no regulation of nonobscene sexually explicit cable programming is allowable. Second, the courts disregarded reasonable local interpretation of the Act.

In Pacifica this Court emphasized that "context is all-important." 438 U.S. at

750. Likewise, Justice Stevens added that "indecency is largely a function of context--it cannot be adequately judged in the abstract." Id. at 742 (Stevens, J., concurring). The Seventh Circuit emphasized a similar point when it noted: "There is . . . a big difference between the danger of an abuse and the abuse itself; and it is a fair question how far the courts should go in making municipalities rewrite there cable television ordinances to prevent dangers that may be largely hypothetical." Omega Satellites Prod., 694 F. 2d at 128. Unfortunately, in this case the district court, with the endorsement of the court of appeals, blithely disregarded these principles and applied a per se, absolute, either-or dogma.

The district court was of the opinion that "[f]ew facts are relevant to a facial

challenge, because the issue is not analyzed in a factual context." 611 F. Supp. at 1107. Thus, the district court ruled that evidence of the type of sexually explicit programming that was being transmitted over cable television in Utah was "immaterial." Id. Evidence of legislative intent was likewise deemed "immaterial to the constitutional issue . . . ." Id.; see also 800 F. 2d at 1102-03 (Baldock, J., concurring). Most significantly, the district court rejected the official interpretation issued by the Attorney General of the State of Utah for the guidance of local enforcing agencies as not proscribing the transmission of nonobscene but sexually explicit material during "adult viewing hours" (midnight to 7:00 a.m.). 611 F. Supp. at 1115; see also 800 F. Supp. at 1007 (Baldock, J., concurring).

It must be remembered that this case involved a facial attack on a state statute which has never been applied, never even been construed by state courts.[21] In this case, the lower federal courts not only failed to await interpretation of the statute by the state courts, but in passing on the facial challenge to the

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21 It is well established that federal courts should defer to state construction of the state statutes. Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n. 5 (1982); Grayned v. City of Rockford, 408 U.S. 104, 110 (1972). In the City of Los Angeles v. Preferred Communications, Inc., this Court declined to rule on the first amendment issue concerning cable television because the record was not sufficiently developed. "We do not think, however, that it is desirable to express any more detailed views on the proper resolution of First Amendment question . . . without a fuller development of the disputed issues of the case. We think that we may know more than we know now about how the constitutional issues should be resolved when we know more about the [factual context]." Id. at 2038.

statute the courts below improperly disregarded the only interpretation of it by a state official, an interpretation which emphasized the modest and balanced nature of the regulation.

There are a number of different methods of regulating the "time, place, manner and context" of transmitting indecent cable television programming which conceivably could satisfy the modest demands of the Utah statute. For instance, a cable company might restrict all sexually explicit programming to optional or extra-tier channels, or provide them on a play-per-view basis, or transmit sexually explicit programming with a "scrambler" so that only viewers with decoding devices could receive them, or restrict the transmission of sexually explicit programming to late night hours when children would not be in the viewing

audience. These steps would appear to satisfy the modest Utah "time, place and manner requirement. Surely there is a need, and substantial room, for development of the "context" in which the Utah statute will be applied. See Wardle, supra note 3, at 678.

The district court summarily concluded, in one paragraph that the Utah statute was unconstitutionally vague. 611 F. Supp at 1117; see also 800 F. 2d at 1007 (Baldock, J., concurring). Yet the statute is much more precise than the indecency statute upheld against a vagueness challenge by this Court in Pacifica. 438 U.S. 739-40. Ironically, the very language deemed impermissibly vague by the lower court is language taken from this Court's opinions. Schad, 452 U.S. at 75; Globe Newpaper Co., 457 U.S. at 607. Flexibility is not vagueness. Grayned, 408 U.S. at 110.

The finding of vagueness is especially ironic in light of the lower court's refusal to consider the context of application or the Attorney General's Guidelines.

Since "context is all important," 438 U.S. at 750, in assessing first amendment challenges to the regulation of indecency, and the lower courts' failed to consider the context, the conclusions of overbreadth and vagueness are erroneous.

IV. CONCLUSION

The issues raised in this case are substantial issues of constitutional law. They have far-reaching impact upon the interests of the states in protecting the welfare of children, the privacy of the home, the concerns of adults, and in reasonably regulating the use of public resources. The amici curiae strongly urge

the Court to note jurisdiction and set this case for oral argument.

Respectfully submitted,
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Certificate of Service

I, Lynn D. Wardle, a member of the Bar of the Supreme Court of the United States certify that all parties required by the Rules of the Supreme Court to be served have been served, and that on February 20, 1987, I deposited three copies of this brief in a United States post office or mail box, postage pre-paid, addressed to: Rex E. Lee, Special Assistant Attorney General for the State of Utah, Sidley & Austin, 1722 Eye Street, N.W., Washington, D.C. 20006; Floyd Abrams, Counsel for Home Box Office, Inc., Cahill, Gordon & Reindel, 80 Pine Street, New York, NY 10005; Bryan L. McDougal, Attorney for Community Television of Utah, Suite 735

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Supreme Court of the United States

OCTOBER TERM, 1986

DAVID L. WILKINSON,
Attorney General of the State of Utah,
Appellant,

v.

CONNIE R. JONES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

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REPLY TO MOTION TO AFFIRM

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MISCELLANEOUS

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REPLY TO MOTION TO AFFIRM

The Motion to Affirm ("M.A.") does not dispute that the primary issue presented by this appeal—"whether the First Amendment denies government any power" to restrict the dissemination of indecent material on cable television "in any circumstances" (*FCC v. Pacifica Foundation*, 438 U.S. 726, 744 (1978) (opinion of Stevens, J.))—is within the appellate jurisdiction of the Court. M.A. at 9. The Motion, moreover, effectively concedes that this question, answered as to the broadcast media in *Pacifica*, is a substantial one meriting plenary review. *Id.*[1] The Motion merely asserts that the Court need not reach that important issue because the Utah Cable Television Programming Decency Act (the "Act") is unduly vague (M.A. at 10-15), the Act is preempted by the Cable Communications Policy Act (M.A. at 22-26), and the lower courts properly disregarded this Court's decision in *Pacifica* (M.A. at 15-20).

None of the grounds raised by appellees in support of summary affirmance is meritorious. The Utah Act is substantially less vague than the indecency statute upheld in *Pacifica*. The Act, furthermore, is not preempted unless unconstitutional (Jurisdictional Statement ["J.S."] at 10 & n.18) and this Court—not the lower federal courts—should determine whether the significant constitutional and regulatory interests recognized in *Pacifica* have any vitality outside the realm of FM radio.

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[1] Indeed, counsel of record for the appellees was quoted in a newspaper article written four years ago which concluded that "the issue of sexually explicit programming on cable television will ultimately be decided in the Supreme Court." Smith, *Battle Intensifying Over Explicit Sex on Cable TV*, N.Y. Times, Oct 3, 1983 at A1 col. 1 and section 3, p. 22 col. 6. " 'The resolution of whether cable is to be more like broadcasting or more like newspapers,' Mr. [Floyd] Abrams, the New York lawyer, said, 'will determine a good deal of the future of what our country is likely to be watching in years to come.' " *Id.*

As evidenced by the amicus brief filed by 10 states in support of the Jurisdictional Statement,[2] this case raises a fundamental issue of serious regulatory and constitutional concern: Can government take any steps to mediate the interests of parents and others who object to the intrusion of patently offensive, sexually explicit programming into the home on family format cable television and the concomitant widespread availability of such programming to children, with the conflicting interests of those who assert the unrestrained constitutional right to distribute whatever material they desire so long as it falls short of hard-core obscenity? This important constitutional conflict is presented in its starkest terms by the present case, and this Court should note probable jurisdiction to provide needed guidance to the states in the exercise of their police power.

I. THE CONSTITUTION DOES NOT FORBID ALL REGULATION OF INDECENT BUT NON-OBSCENE SPEECH ON CABLE TELEVISION

Appellees' principal submission is that the Court should decline review because the precise coverage of the Utah Act is speculative. *See* M.A. at 10-15. The suggestion is ironic in light of appellees' broad facial attack on the Act and, in any event, is wide of the mark.

Any speculation or abstract uncertainty regarding the interpretation of the Act exists because appellees chose to attack the Act on its face, the day after passage, before any Utah government official could even consider concrete enforcement of its provisions. Appellees' discussion of the Act's applicability to "Carnal Knowledge" or "Kramer v. Kramer" (M.A. at 12-13) is accordingly premature. The fundamental question raised by this case is not—as appellees would have it—whether the Act is unconstitutional because of potentially troublesome questions of coverage in close cases. *Compare* M.A. at 12-15

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[2] *Wilkinson v. Jones*, No. 86-1125 (October Term 1986), Brief of Amici Curiae, the States of Arizona, Kansas, Mississippi, Missouri, New Hampshire, New Mexico, Pennsylvania, South Carolina, Washington and West Virginia.

with J.S. at 24-27. On the contrary, the primary issue here is whether the Act should be struck down on its face because it has no conceivable constitutional application. J.S. at 25-27; *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. 2794, 2802 (1985) (the overbreadth doctrine does not apply unless the "overbreadth is incurable and would taint all possible applications of the statute").[3]

The fundamental constitutional questions identified in the Jurisdictional Statement are sharply presented here. The lower courts refused to consider such facts as the types of materials that would, in the opinion of the State Attorney General, prompt enforcement actions under the Act. J.S. at 9-10. *See* App. B at 56a ("Few facts are relevant to a facial challenge, because the law at issue is not analyzed in a factual context"). The lower courts did not debate, as appellees now attempt to do, whether "Carnal Knowledge" or "Kramer v. Kramer" falls within or without the Act. M.A. at 14. Instead, those courts held the Act facially unconstitutional because the "statute regulates 'indecent' material and does not limit itself to material that is legally obscene." App. B at 59a; App. A at 5a. Thus, the Court is squarely presented with a narrow constitutional issue it has faced before: Whether the First Amendment denies government "any power to regulate" the electronic dissemination of material that "is indecent but not obscene." *Pacifica*, 438 U.S. at 729. Appellees to the contrary, there is no sound reason for this Court to avoid resolution of that vital question.

II. THE ACT IS NOT UNCONSTITUTIONALLY VAGUE

Appellees assert that the Court need not review the Act because "the statute is a textbook example of a law

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[3] Appellees either misconstrue or choose to ignore the import of the above. At pages 20-21 of the Motion to Affirm, they suggest that the lower courts properly reached their facial attack on the Act, but they nevertheless anomalously urge the Court to now decide the case on "narrower constitutional grounds." Appellees, however, presented the lower courts with the broadest of all possible arguments: that the Act is facially invalid. They cannot duck that issue once in this Court.

that fails adequately to describe that which it seeks to proscribe." M.A. at 10. The argument is pure hyperbole.

As an initial matter, the Act's language is considerably more precise than the federal indecency statute involved in *Pacifica*. There, the Court confirmed the constitutionality of a statute providing a $10,000 fine or imprisonment for "[w]hoever utters any obscene, indecent, or profane language by means of radio communication." 18 U.S.C. § 1464 (1982); *Pacifica*, 438 U.S. at 726 n.3, 738-751. In contrast with the stark and completely undefined terms of that statute, the Utah Act surely does not suffer an "incurable lack of ascertainable standards of conduct." M.A. at 15. Indeed, the language of the Act is no more vague than civil and criminal statutes routinely sustained by the Court.[4]

The principal elements of the Utah Act are drawn directly from opinions of this Court dealing with regulation of obscene and indecent speech. The requirement that "indecent materials" be "patently offensive" is derived directly from this Court's decision in *Miller v. California*,[5] as is the Act's reference to "contemporary community standards."[6] The "nuisance" theory on which the Act proceeds, as well as its requirement that "patent offensiveness" be determined after a full consideration of the "time, place, manner and context in which the material is presented," are likewise drawn from *Pacifica*. There, the Court upheld the FCC's regulation of indecent broadcast speech only because the regulation "rested on a nuisance rationale" which required "consideration of a

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[4] The "continuing course of conduct" element of the Utah Act, for example, is surely no more suspect on general vagueness grounds than the "pattern of racketeering activity" requirement embodied in RICO. *See, e.g., Sedima, S.P.R.L. v. Imrex Co.*, 87 L.Ed.2d 346, 361 (1985) (the "pattern of racketeering activity" element of 18 U.S.C. § 1962 (1982) not questioned for vagueness despite "the failure of Congress and the courts to develop a meaningful concept of 'pattern' ").

[5] 413 U.S. 15, 24 (1973) (obscene matter must, *inter alia*, "portray sexual conduct in a patently offensive way").

[6] *Id.*

host of variables," including "time of day," "content of the program," "composition of the audience", and "context." 438 U.S. at 750.

In these circumstances, the assertion that the Act deserves summary invalidation (M.A. at 10-15) is insubstantial. J.S. at 22. In any event, numerous official sources largely ignored by appellees elucidate the meaning of the Act.

Appellees suggest that the Act is vague because it does not specify "the time of day when indecent programming [can] be shown." M.A. at 11. The indecency statute upheld in the one case that treats this issue, however, also includes no such specification. *Pacifica*, 438 U.S. at 731 n.3. The *only* difference between *Pacifica* and the Utah Act in this respect is that, here, the formal opinion of the Attorney General interpreting the Act and establishing enforcement policies, and the judicial and legislative sources upon which that opinion rests, effectively vitiate any such "vagueness" objection.[7]

The Attorney General's opinion, far from being "inexplicable," or without "statutory basis," M.A. at 11, 4, is a reasonable interpretation of the Act's own "time, place, manner and context" language. The opinion, including its enforcement guidelines, was based on the Act itself, the Act's intent statement, the debates preceding

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[7] Appellee's suggestion (M.A. at 14 n.12) that formal opinions of the Attorney General are nothing more than advisory expressions of his views is flatly contrary to numerous decisions of this Court which recognize the authoritative character of such opinions. *See* J.S. at 24 n.42. Moreover, contrary to the assertion of appellees, it is the "duty" of the Attorney General "to exercise supervisory powers over the . . . county attorneys of the state in all matters pertaining to the duties of their offices. . . ." Utah Code Ann. § 67-5-1(5) (1978). These powers include, of course, supervisory authority with regard to enforcement policies. Thus, the responsibility of the Attorney General extends even beyond the duty to render interpretations of statutes, and includes the duty to provide binding guidelines to county attorneys. As a practical matter, city attorneys can be expected to follow the guidelines as well, especially since the municipalities, even if they were disposed to ignore the guidelines, do not have sufficient financial resources to fight the cable companies to final judicial resolution.

passage of the Act, and this Court's opinions. Those materials, summarized in the Jurisdictional Statement (at 4-8), make clear that the purpose of the Act is not to ban indecency, as asserted by appellees (M.A. at 18), but rather to channel objectionable, explicit sexual materials to late evening hours or other contexts where their presentation will not be patently offensive. Furthermore, the legislative debates, upon which the opinion drew heavily, reflect the legislative sponsors' close familiarity with and incorporation of the decisions of this Court dealing with the regulation of obscenity and indecency. J.S. at 4-7 & n.14. Essentially, the Attorney General was saying that he would "not second guess this legislative judgment." *New York v. Ferber*, 485 U.S. 755, 759 (1982).

III. THE ACT IS NOT PLAINLY UNCONSTITUTIONAL

The constitutional issues presented by this case are identical to those presented in *Pacifica*—only the context is different. *Pacifica* involved regulation of indecent broadcasts on FM radio; this case involves regulation of indecent programs on cable television. *Pacifica* held that limited regulation of indecent broadcasts is constitutionally sound; the lower courts necessarily held exactly the opposite with respect to cablecasts. Therefore, appellees' claim that the Utah Act is plainly unconstitutional (M.A. at 15-20) is absurd. To reach that conclusion this Court, like the lower courts, would first have to render *Pacifica* a virtual dead letter. *See* J.S. at 17.

Appellees, to avoid the force of the above, make some efforts to distance this matter from *Pacifica*. That case, however, cannot be rationally distinguished from the present controversy. *Pacifica* involved the regulation of indecent material on a nuisance rationale. 438 U.S. at 750. So does the present case. J.S. at 23-24. Both FM radio and cable television have a pervasive presence in modern society, and both are available in the home.[8]

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[8] Appellees seek to turn the "pervasiveness" issue into a matter of metaphysics. Cable television is not "pervasive," they assert, because its signal travels through a cable rather than through the

Finally, cable television, no less than FM radio, is uniquely accessible to children.[9]

Appellees suggest that this case is somehow different from *Pacifica* because that decision was "forged in the context of Federal Communications Commission ('FCC') review of programs presented by a government-licensed radio broadcaster." M.A. at 9. This submission, however, fails to recognize that the *Pacifica* holding is based on the meaning of the First Amendment, and not on an interpretation of the Federal Communications Act.[10] The people of the State of Utah and other states[11] are just as entitled to have this Court declare the scope of their constitutionally permissible rights to legislate in this important area as is the Federal Communications Commission.

The only differences between this case and *Pacifica* are that this case involves cable television instead of FM radio, and it comes up on appeal rather than certiorari. Both of these differences cut in favor of plenary review. Cable television is, if anything, more pervasive (in the

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atmosphere. M.A. at 16. But, aside from the incongruity of suggesting that constitutional law should turn on such metaphysical distinctions, the argument fails on its own terms. As pointed out in the Jurisdictional Statement, cable television signals are indeed distributed through the atmosphere—just as broadcasting signals. Only the final stage of transmission takes place through cable. J.S. at 3 n.3.

[9] On this point, appellees assert that, while the federal government acted properly to shield young children from indecent material in *Pacifica*, the identical interest in protecting youth does not justify the Utah Act. M.A. at 18. Utah, they assert, may not "'reduce the adult population . . . to [watching] only what is fit for children.'" *Id.* (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). But, whether appellees are correct on this submission is, at this point, simply irrelevant. In *Pacifica*, this Court rejected the *Butler v. Michigan* objection. 438 U.S. at 749-750 & n.28. Thus, appellees are essentially arguing that *Pacifica* was wrongly decided. That assertion alone justifies full consideration of this case by the Court.

[10] *Cf.* 438 U.S. at 778-780 (Stewart, J., dissenting).

[11] *See* amicus brief, note 2 *supra*.

sense the *Pacifica* majority used that term)[12] than FM radio. Its capacity to make an instantaneous and lasting impression on children is greater, simply because it employs pictures as well as words.[13] As to the other difference—certiorari versus appeal—the appellees' response to the Jurisdictional Statement is a Motion to Affirm. The Tenth Circuit's judgment cannot be affirmed per curiam without tacitly overruling *Pacifica* or at least limiting that precedent to its facts. That result is far too important for summary treatment, as even appellees recognize. *See* M.A. at 9. The questions presented here should be decided by this Court, and not left to lower federal courts.

IV. THE ACT IS NOT FEDERALLY PREEMPTED

Appellees argue that the Cable Communications Policy Act preempts the Utah Act. M.A. at 22-26. They cite section 638 of the federal Act, 47 U.S.C. § 558 (App. I at 128a), which explicitly authorizes the states to apply "obscenity . . . or other similar laws" to cablecasters, and make abstract arguments that Congress must not have intended to include indecency within the phrase "other similar laws." The legislative history of the Cable Communications Policy Act unequivocally demonstrates the contrary.[14] The legislative reports cited in the Jurisdictional Statement (at 10 n.18) show that Congress intended state indecency provisions, so far as constitutional, to be within the regulatory authority of the states.

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[12] *See* 438 U.S. at 748-749 and note 8, *supra*.

[13] Cable television can do more than "enlarge[] a child's *vocabulary* in an instant." *Pacifica*, 438 U.S. at 749 (emphasis added).

[14] Appellees also argue that state indecency statutes must be preempted because of the effect such statutes might have on the interstate transmission of cable programs. M.A. at 24-25 (citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984)). The argument, however, is addressed to the wrong forum. Congress specifically chose in section 638 of the Cable Communications Policy Act not to preempt state indecency statutes. Appellees' assertions regarding the supposed chaotic results of that choice should be directed to Congress—not this Court.

The debates and colloquies surrounding the enactment of the federal statute are even more explicit. On June 26, 1984, there was a markup session of the House Committee on Energy and Commerce (the committee that reported the bill which became the Cable Communications Policy Act) during which Congressman Nielson of Utah and Committee Chairman John Dingell exchanged the following remarks:

> Cong. Nielson: I would also like to clarify that laws regulating indecency are included under section 639 [now 638], through the use of the phrase 'other similar laws,' as long as these laws are constitutional.
>
> Chairman Dingell: Yes. Indecency is similar to obscenity, and thus would be included as long as such laws are constitutional.[15]

A similar colloquy between Senators Goldwater[16] and Trible on the date the House and Senate accepted the House Committee version of Section 638 was inserted into the Congressional Record to explicate the reach of that provision (130 Cong. Rec. S14289 (daily ed. Oct. 11, 1984):

> Mr. Trible: I also wish to ask whether section 638 applies to Federal, State and local laws dealing with indecency on cable television?
>
> Mr. Goldwater: Yes, it does and that is the understanding of the conferees. Indecency laws are related to laws prohibiting obscenity, and thus would be covered by the phrase from section 638: "and other similar laws." Under this section, Federal, State, and local laws regulating indecency on cable would be preserved.[17]

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[15] The transcript of this session was not officially printed. An unofficial transcript was verified by the affidavit of Congressman Nielson. Rec. 694-697.

[16] Senator Goldwater was the chairman of the Communications Subcommittee of the Senate Commerce Committee, and the sponsor of S. 66, the bill that ultimately became the Cable Communications Policy Act.

[17] This colloquy was specifically designated as part of the legislative history of the bill. 130 Cong. Rec. S14285 (daily ed. Oct. 11,

Every Senator or Congressman who spoke on the subject did so in favor of the freedom of the states to regulate indecency, provided only that such regulation was constitutional. There is no evidence that any member of Congress disagreed with this sentiment.[18] In light of the plain language of the Cable Communications Policy Act and the legislative history, set out above, appellees' suggestion that summary affirmance is appropriate here on preemption grounds is simply irrational.[19]

1984). It therefore is of no significance, as the district court thought, that it was written rather than spoken into the record. App. B at 53a.

[18] One who claims that state authority is federally preempted has the burden of proving it; all doubts are to be resolved against preemption. *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963). In his concurring opinion below, Judge Baldock agreed that the federal Cable Policy Act did not preempt the Utah Act, App. A at 12a-15a.

[19] Appellees did not make extensive arguments regarding the attorneys fee issue raised in the Jurisdictional Statement. M.A. at 22-23 n.20. The issue is within the appellate jurisdiction of the Court (J.S. at 2 n.1) and is, in any event, an important question meriting review. Congress clearly did not intend to provide windfall attorneys' fees to wealthy litigants in circumstances such as those of this case. *See* J.S. at 27-30; *see also Zarcone v. Perry*, 581 F.2d 1039, 1044 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (fees not to be awarded unless "a person in the plaintiff's position would have been deterred or inhibited from seeking to enforce civil rights without an assurance that his attorney's fees would be paid if he were successful"). Moreover, although awards of attorneys fees to prevailing parties are "ordinarily" appropriate in civil rights actions unless "unjust" (*Newman v. Piggie Park Enterprises*, 390 U.S. 400, 401 (1968)), this is not an ordinary case and the award of fees here is unjust. See J.S. at 29-30.

Here, the State is defending legislation conscientiously drawn within the guidelines offered by the language of this Court's decisions. It has previously been noted that state legislation should be upheld where "[b]oth the text and the background of [the] statute indicate that the state legislature sought to conform" its law to constitutional standards outlined in the opinions of the Court. *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. 2794, 2805 (1985) (O'Connor, J., concurring).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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